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APPENDIX

FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 79

STELLA CONNELL,
individually, and on behalf of all persons similarly situated,
Appellant,

v.

JAMES M. HIGGINBOTHAM, Superintendent of the Orange County Board of Public Instruction, LOUISE BREEZE, Chairman of the Orange County Board of Public Instruction, and LOWELL CLEMENTS, RAYMOND H. BASSETT, WILLIAM D. LaRUE, HARLEY THOMPKINS, MRS. LEE K. DAVIES and STEWART M. SCHAFFER,
Appellees
(Defendants).

FLOYD T. CHRISTIAN,
Commissioner of Education, State of Florida,
Appellee
(Intervenor).

On Appeal from the United States District Court for the Middle District of Florida

FILED JANUARY 22, 1970
PROBABLE JURISDICTION NOTED JUNE 8, 1970

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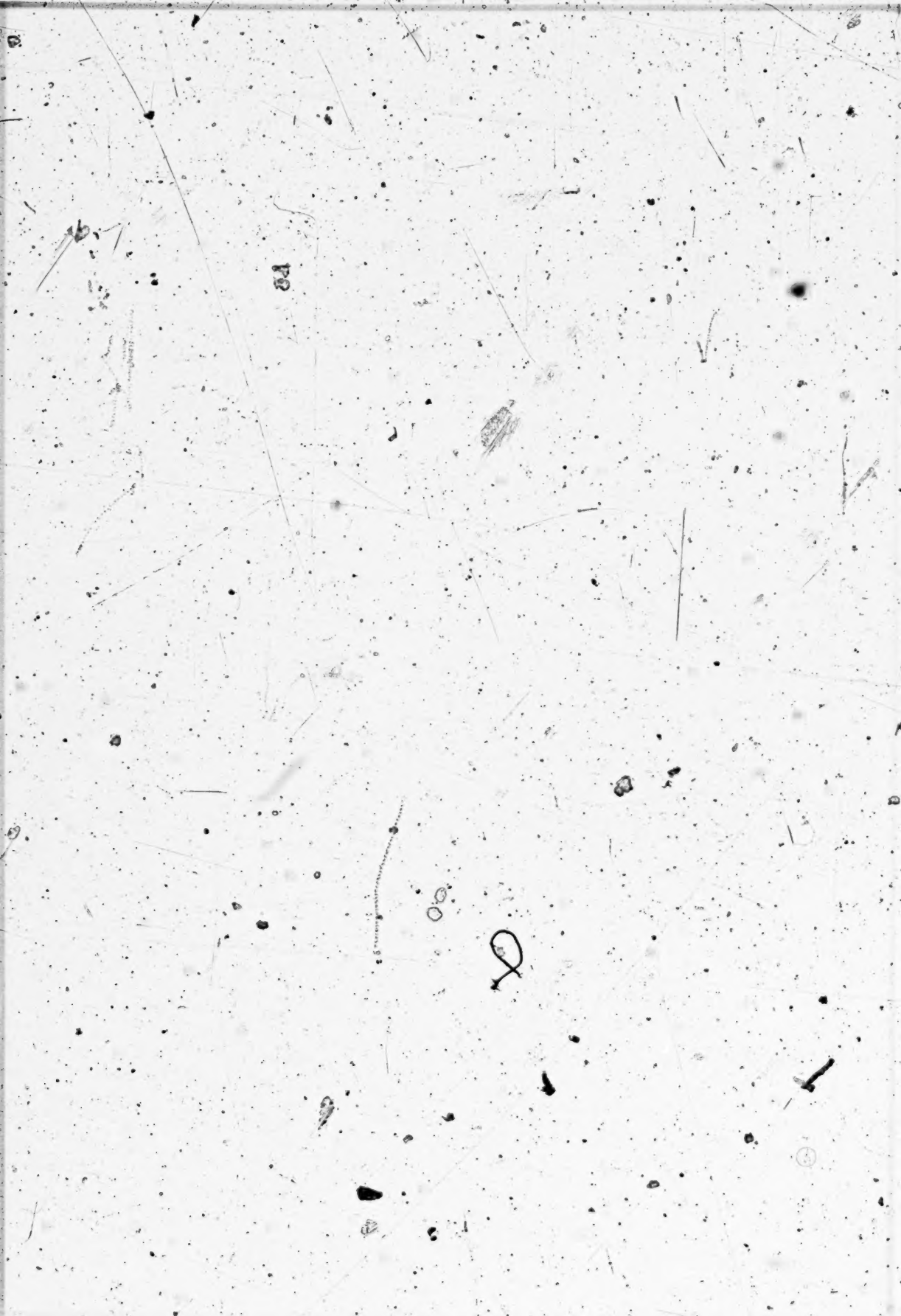

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

STELLA CONNELL,

Plaintiff,

vs.

No. 69-34-ORL-CIV.

JAMES M. HIGGINBOTHAM, Sueprintendent of the Orange County Board of Public Instruction, et al,

Defendants.

DOCKET ENTRIES

1969

Feb. 26 - Complaint filed, requesting 3-judge trial, permanent injunction, etc.

Mar. 10 - Designation by Judge John R. Brown of District Judge and Circuit Judge constituting 3-judge court - Charles R. Scott, Bryan Simpson & G. Young.

Mar. 17 - Proceedings on Petition for Temporary Restraining Order.

Mar. 17 - Plaintiff's Exhibits Nos. 1, 2, 4 through 8 incl. filed in Evidence.

Mar. 17 - Court Denies Petition for Temporary Restraining Order - Order to be entered.

Mar. 17 - Hearing before 3-Judge Court tentatively set for March 28, 1969.

Mar. 18 - Order Denying Temporary Restraining Order.

Mar. 26 - Answer by James M. Higginbotham.

Mar. 27 - Petition to Intervene, by Floyd Christian, Commissioner of Education of the State of Florida.

Mar. 28 - Order Granting Petition to Intervene and Floyd T. Christian, Commissioner of Education of the State of Florida is made a party defendant; Answer to be filed NLT 4-3-69 - cy to J. Scott and J. Simpson.

Apr. 3 - Answer by Floyd T. Christian, Commissioner of Edueation of State of Fla.

Apr. 11 - Proceedings on Trial before 3 Judge Court.

Apr. 11 - Plaintiff's Exhibits admitted in Evidence during Hearing held on 3-17-69 are admitted in Evidence in this trial.

Apr. 11 - Plaintiff's Exhibits Nos. 9 and 10 filed in Evidence.

Apr. 11 - Taken under advisement

Oct. 30 - Findings of Fact and Conclusions of Law, by Three-Judge Panel.

Oct. 30 - Judgment entered for Plaintiff.

Nov. 25 - Notice of Appeal filed by Plaintiff.

[Caption omitted in printing]

COMPLAINT

Plaintiff, STELLA CONNELL, individually and on behalf of all other persons similarly situated, by her undersigned counsel, for her Complaint against Defendants, alleges as follows:

I. JURISDICTION

This is an action for declaratory, injunctive and other relief. Jurisdiction is conferred on this Court by 28 U.S.C. §§1331, 1343, 2201, 2202, 2281 and 2284, and the First, Fifth and Fourteenth Amendments to the Constitution of the United States. The amount in controversy herein ex-

ceeds the sum of $10,000.00, exclusive of interests and costs.

II. PLAINTIFF

Plaintiff is a citizen of the United States and resides in Orange County, Florida. Plaintiff is employed by the Orange County Board of Public Instruction as a teacher, and is presently teaching at Callahan Elementary School in Orlando, Orange County, Florida.

III. CLASS ACTION

Plaintiff brings this action, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on her own behalf, and on behalf of all of the state employees in Florida, who are required to execute a "loyalty oath" as a condition of their employment. There are questions of law and fact common to Plaintiff and the members of the class she represents. These common questions are the predominating questions in the Complaint and the members of the class are so numerous as to make joinder of parties impracticable. The claims of the Plaintiff are typical of the claims of all members of the class and the Plaintiff fairly and adequately represents the claims of all members of the class.

IV. DEFENDANTS

Defendant, JAMES M. HIGGINBOTHAM, is Superintendent of Public Instruction of Orange County, Florida; Defendant LOUISE BREEZE, is Chairman of the Board of Public Instruction of Orange County, Florida, and LOWELL CLEMENTS, RAYMOND H. BASSETT, WILLIAM D. LaRUE, HARLEY THOMPKINS, MRS. LEE K. DAVIES, and STEWART M. SCHAFFER, are members of the Board of Public Instruction of Orange County, Florida.

V. STATUTE INVOLVED

The applicable portions of Chapter 876 of the Statutes of the State of Florida are attached hereto and incorporated herein by reference as Exhibit "A". The Supreme Court of the United States had had occasion to construe Chapter 876. 05 of the Florida Statutes in the Case of *Cramp v. Board of Public Instruction*, 368 U.S., 278, 7L. Ed. 2nd 285, 82 S. Ct. 275, 1961, and determined that §876.05 is unconstitutional. Upon remand to the Supreme Court of the State of Florida, the Florida Supreme Court construed §876.05 of the Florida Statutes, in the light of the mandate of the United States Supreme Court, and held that only the following part of said provision was unconstitutional, to-wit: "that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party;" and that the remainder of §876.05 was constitutional, valid and in force. (*Cramp v. Board of Public Instruction* (1962, 137 So 2d, 528).

VI. CAUSE OF ACTION AND RESPONSIBILITY OF DEFENDANTS

On or about January 27, 1969, Plaintiff was employed as a classroom teacher in the Fourth Grade at Callahan Elementary School in Orlando, Orange County, Florida, by Defendants, their agents, servants and/or employees. Plaintiff's employment commenced on January 27, 1969 and was to continue for the balance of the 1968-1969 school year, and Plaintiff is now and at all times relevent herein, has been employed as a teacher by the Defendant, Orange County Board of Public Instruction. At the time of her employment, Plaintiff was not required to sign any "loyalty oath" nor was she advised that the execution of a "loyalty oath" by her was a condition of her employment and payment by Defendants.

Notwithstanding the decisions of the United States Supreme Court in 1961 and the Supreme Court of the State of

Florida in 1962, above referred to, Defendants notified Plaintiff, on or about February 7, 1969 that Plaintiff would be required to execute a "loyalty oath" as a condition of continuing her employment, the form of said oath being identical to that held to be unconstitutional by the United States Supreme Court in *Cramp, supra*, a copy of said oath being attached hereto and incorporated herein by reference as Exhibit "B". Plaintiff refused to execute such oath citing to Defendants the *Cramp* decisions and advising Defendants that said oath was invalid and unconstitutional. Defendants thereupon modified the form of said "loyalty oath" and on or about February 14, 1969, Defendants notified Plaintiff that she would be required to sign this modified "loyalty oath", a copy being attached hereto and incorporated herein by reference as Exhibit "C", as a condition precedent to her continued employment by Defendants. Defendants further informed Plaintiff that unless Plaintiff executed the "loyalty oath" attached hereto as Exhibit "C" and acknowledged it before a notary public of the State of Florida and returned said executed "loyalty oath" to Defendants, Defendants would refuse to pay Plaintiff the agreed salary, based upon Plaintiff's qualifications. The failure and refusal of Plaintiff to sign a "loyalty oath" is the sole reason and basis for Defendants' failure and refusal to formalize their contractual agreement with Plaintiff and pay her in accordance therewith, and Defendants have failed and refused to pay the Plaintiff any salary whatsoever from the date of her commencement of employment on January 27, 1969, to the date of the filing of this suit. Plaintiff has advised Defendants that the "loyalty oaths" attached hereto as Exhibits "B" and "C" are invalid and unconstitutional and Plaintiff has refused and does now refuse to execute said "loyalty oaths" or either of them, for the reasons more particularly set forth hereinafter.

VII. CLAIM AND PRAYER FOR RELIEF

Chapter 876.05 *et. seq.* of the Florida Statutes, as construed and applied by Defendants herein is invalid and unconstitutional for the following reasons:

(a) It is so vague and ambiguous that it cannot be interpreted with any reasonable degree of certainty, and since it is criminal in nature and the purported violation thereof imposes criminal penalties as provided in Chapter 876.05 of the Florida Statutes, it denies Plaintiff due process of law guaranteed under the Fifth and Fourteenth Amendments;

(b) It abridges Plaintiff's rights to freedom of speech, freedom of assembly and freedom of association guaranteed under the First, Fifth and Fourteenth Amendments;

(c) It singles Plaintiff out from other citizens of the State of Florida who are also receiving benefits from the State of Florida, requiring that she acknowledge her "loyalty" while not requiring the same from each and every other citizen of the State of Florida, and as such, is arbitrary and discriminatory as applied to Plaintiff, thereby depriving Plaintiff of her right to equal protection under the law guaranteed by the Fifth and Fourteenth Amendments;

(d) The purpose, intention and effect of the statute is to coerce Plaintiff into a conformity of political beliefs and associations prescribed, sanctioned and approved by governmental authority, and as such, violates the First, Fifth, Fourteenth Amendments;

(e) The statute makes no distinction between "lawful" and "unlawful" purposes of unnamed organizations, and accordingly, prescribes all membership in any "organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States (or) Florida by force or violence" and accordingly, is predicated upon "guilt by association" and violates the First, Fifth and Fourteenth Amendments.

No previous application for the relief sought herein has been made to this or any other Court. Unless this Court restrains the unconstitutional operation and enforcement of Chapter 876.05 *et.seq.* of the Florida Statutes, Plaintiff will be discharged from her employment, will suffer embarrassment and humiliation and may be stigmatized in the eyes of the community as "disloyal" and will suffer other immediate and irreparable injury. Plaintiff has no adequate remedy at law.

WHEREFORE, Plaintiff STELLA CONNELL, on behalf of herself and other similarly situated, prays that this Court:

1. Assume jurisdiction in this matter;

2. Pursuant to Title 28 U.S.C. 2281 and 2284, convene a three-judge federal district court immediately to hear and determine this proceeding;

3. Issue a permanent injunction restraining Defendants, their agents, employees, attorneys and all other acting in concert therewith from the enforcement, operation or execution of §876.05 through 876.10 inclusive of the State of Florida;

4. That Chapter 876.05 of the Florida Statutes be construed and declared to be unconstitutional;

5. That pending the hearing and determination of the prayers for permanent relief, an interlocutory injunction issue restraining the Defendants, their agents, servants, employees and attorneys and all others acting in concert therewith from enforcing or attempting to enforce in any way the provisions of Sections 876.05 through 876.10 inclusive of the State of Florida, or from institution or undertaking any proceedings whatsoever pursuant to said statutes against the individual Plaintiff, or from discharging her from her present employment as a teacher in the Orange County public school system or from refusing to pay to her her proper salary thereof; and

6. Allow Plaintiff her costs herein and grant any and all other relief which this Court may see fit in the premises.

Plaintiff respectfully prays that the above relief be granted.

TOBIAS SIMON, Attorney for
Plaintiff
223 S. E. First Street
Miami, Florida 33131

[Subscription omitted in printing]

EXHIBIT "A"

876.05 State employees; oath—

(1) All persons who now or hereafter are employed by or who now or hereafter are on the payroll of the state, or any of its departments and agencies, subdivisions, counties, cities, school boards and districts of the free public school system of the state or counties, or institutions of higher learning and all candidates for public office, are hereby required to take an oath before any person duly authorized to take acknowledgements of instruments for public record in the state in the following form:

I, _____, a citizen of the State of Florida and of the United States of America, and being employed by or an officer of _____ and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; (that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party); that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow

of the Government of the United States or of Florida by force or violence.

(2) Said oath shall be filed with the records of the governing official or employing governmental agency prior to the approval of any voucher for the payment of salary, expenses, or other compensation.

History.—Comp. §1, ch. 25046, 1949.
Note.—See 7 L.Ed. 2d 285 and 137 So. 2d 828 as to constitutionlity of section.
cf.—§90.01, Oaths, requirements.

876.06 Discharged for refusal to execute.—

If any person required by §§876.05-876.10 to take the oath herein provided for fails to execute the same, the governing authority under which such person is employed shall cause said person to be immediately discharged, and his name removed from the payroll, and such person shall not be permitted to receive any payment as an employee or as an officer where he or she was serving.

History.—Comp. §2, ch. 25046, 1949.

876.07 Persons giving aid, advice, etc., to communist party.—Any person having taken the oath provided for in §876.05 and who thereafter should become a member of the communist party or who lends aid, support, advice, counsel or influence to the communist party or who expresses any belief in or advocates the overthrow of the government of the United States or of the state by violence or force or thereafter becomes a member of an organization or party which believes in or teaches directly or indirectly the overthrow of the government of the United States or of the state by force or violence, shall immediately be discharged from his employment by the employing authority and his name shall be removed from the payroll, and thereafter such person shall not be permitted to receive any payment as an employee or an officer where he or she then was serving. Any person seeking to qualify for public office who fails or refuses to file the oath required by this act shall be held to have failed to qualify as a candidate for public office, and the name of such person shall not be printed on the ballot as a qualified candidate.

History.—Comp. §3, ch. 25046, 1949.

876.08 Penalty for not discharging.—Any governing authority or person, under whom any employee is serving or by whom employed who shall knowingly or carelessly permit any such employee to continue in employment after failing to comply with the provisions of §§876.05-876.10, shall be guilty of a misdemeanor and shall be punished by a fine not exceeding five hundred dollars or by imprisonment not exceeding six months or by both fine and imprisonment.

History.—Comp. §4, ch. 25046, 1949.

876.09 Scope of law.—

(1) The provisions of §§876.05-876.10 shall apply to all employees and elected officers of the state, including the Governor and constitutional officers and all employees and elected officers of all cities, towns, counties and political subdivisions, including the educational system.

(2) This act shall take precedence over all laws relating to merit, and of civil service law.

History.—Comp. §§5, 7, ch. 25046, 1949.

876.10 False oath; penalty.—If any person required by the provisions of §§876.05-876.10 to execute the oath herein required executes such oath, and it is subsequently proven that at the time of the execution of said oath said individual was guilty of making a false statement in said oath, he shall be guilty of perjury, and shall be prosecuted and punished for the crime of perjury in the event of conviction.

History.—Comp. §6, ch. 25046, 1949.

EXHIBIT "B"

LOYALTY OATH

As Required by Chapter 25046 (No. 50) Acts of 1949

I, _____

a citizen of the State of Florida and of the United States of America, and being employed by or an officer of _____

and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the government of the United States or of Florida by force or violence.

_____

State of Florida
County of: _____

Personally appeared before me _____ who states _____ has read the foregoing oath and is familiar with what it says and that _____ signed it freely and voluntarily, and in my presence.

SWORN TO before me this
_____ day of _____
A.D. 19___.

_____

EXHIBIT "C"

LOYALTY OATH

As Required by Chapter 25046 (No. 50) Acts of 1949

"I, . . . a citizen of the State of Florida and of the United States of America, and being employed by or an officer of . . . and a recipient of public funds as such employee or

officer do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence."

_____

STATE OF FLORIDA)
COUNTY OF) ss:

Personally appeared before me _____ who states _____ has read the foregoing oath and is familiar with what it says and that ____ signed it freely and voluntarily, and in my presence.

SWORN TO and subscribed to and before me this _____ day of _____, A.D. 196__.

_____
NOTARY PUBLIC

MY COMMISSION EXPIRES:

_____

(NOTARY SEAL)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

STELLA CONNELL,

Plaintiff,

vs.

NO. 69-34-ORL-CIV.

JAMES M. HIGGINBOTHAM, Superintendent of the Orange County Board of Public Instruction, et al,

Defendants.

Filed Mar. 19, 1969
Orlando, Fla.
Wesley R. Thies
Clerk

ORDER DENYING TEMPORARY RESTRAINING ORDER

On February 26, 1969, the plaintiff, STELLA CONNELL, filed her complaint against the defendants seeking a hearing and determination of the federal constitutional issues allegedly involved by a three judge federal district court and an interlocutory injunction restraining the defendants from discharging the plaintiff as a teacher in the Orange County public school system or refusing to pay her salary as a teacher.

This Court notified the Chief Judge of the Fifth Circuit Court of Appeals who has designated two other judges, one of whom is a Circuit Judge, to sit with the requesting judge as a three judge court. By separate order a briefing schedule and dates for a pre-trial conference and trial of this cause have been set.

Section 2284(3) of Title 28, United States Code, provides that whenever an application for an interlocutory injunction is made, the district judge to whom the application is made

may, at any time, grant a temporary restraining order to prevent irreparable damage. This Court therefore, pursuant to due notice to all parties, held a hearing to determine if a temporary restraining order should be granted on plaintiff's application for an interlocutory injunction.

The plaintiff commenced teaching on January 27, 1969, at Callahan Elementary School in the Orange County public school system but at such time had not yet been fully approved by the School Board as a permanent teacher. The plaintiff was not previously employed as a teacher, either in the Orange County system or elsewhere. In order for a teacher to be finally employed by the system, approval by the School Board and the issuance of a formal contract must be made. A prerequisite to such board action is a recommendation therefor by the Superintendent of Public Instruction of Orange County. In this case no such recommendation has been forthcoming because the plaintiff has refused to sign a loyalty oath as required by Chapter 876. 05 of the Florida Statutes as modified by *Cramp v. Board of Public Instruction*, 368 U.S. 278 and *Cramp v. Board of Public Instruction*, 137 So. 2d 528.

At the hearing on the matter of the issuance of a temporary restraining order the plaintiff testified that she was opposed to signing any oath or any portion of the oath required by the aforesaid Florida Statute. Even if certain portions of the prescribed oath are finally held to be unconstitutional, as contended by plaintiff's counsel, there is no contention made by plaintiff's counsel that all portions of the oath are unconstitutional and that the State of Florida could not require the plaintiff to swear or affirm support of the Constitution of the United States. Therefore, based upon the plaintiff's own testimony, even if her counsel's legal contentions are correct, she has not shown that she would comply with the Florida law entitling her to be finally approved and employed as a permanent teacher in the public school system; it is, therefore, unnecessary at this time to determine whether she has been in fact employed by the system.

It is clear from the evidence in this case that the plaintiff was aware at the time or shortly after she applied for a teaching position, of the loyalty oath requirement and that this case has arisen in the nature of a "test case". This is not the case of a teacher of long standing who finds herself facing expulsion from a job long held as did Cramp in the above cited cases. It appears to this Court that under the circumstances of this case the plaintiff has not proved that she will suffer irreparable damage if the temporary restraining order is not granted; it is, therefore,

ORDERED that the application for a temporary restraining order be and is hereby denied.

DONE and ORDERED in Chambers at Orlando, Florida, this 18th day of March, 1969.

UNITED STATES DISTRICT JUDGE

Copies mailed to:

Jerome J. Bornstein, Esquire
125 South Court Avenue
Orlando, Florida

Tobias Simon, Esquire
223 S. E. First Street
Miami, Florida 33131

John Motsinger, Jr., Esquire
100 East Robinson Street
Orlando, Florida

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION

STELLA CONNELL, Individually, and on behalf of all other persons similarly situated,

Plaintiff,

vs.

CIVIL ACTION NO. 69-34
Three-Judge Court

JAMES M. HIGGINBOTHAM, Superintendent of the Orange County Board of Public Instruction; LOUISE BREEZE, Chairman of the Orange County Board of Public Instruction; and LOWELL CLEMENTS, RAYMOND H. BASSETT, WILLIAM D. LaRUE, HARLEY THOMPKINS, MRS. LEE K. DAVIES, and STEWART M. SCHAFFER,

Defendants.

ANSWER

Defendants, JAMES M. HIGGINBOTHAM, et al, by their undersigned counsel, for their Answer to Plaintiff's Complaint, say:

I.

Deny that amount in controversy herein exceeds the sum of $10,000.00, exclusive of interests and costs.

II.

Defendants are without knowledge of Plaintiff's residence, and deny that Plaintiff is now, or has ever been, employed as a teacher by the Orange County Board of Public Instruction.

III.

Defendants deny that Plaintiff represents a class of employees of the State of Florida as Defendants are without knowledge of Plaintiff's employment by the State of Florida.

IV.

Defendants admit paragraph IV of the Complaint.

V.

Defendants admit Exhibit "A" of the Complaint contains a copy of portions of Chapter 876 of the Statutes of the State of Florida. Defendants are without knowledge as to the other allegations contained in paragraph V of the Complaint.

VI.

Defendants deny the allegations contained in paragraph VI of the Complaint.

VII.

Defendants pray that this Court will enter its Order denying Plaintiff the relief sought in paragraph VII in that:

a) Plaintiff lacks proper standing to question the constitutionality of Chapter 876.05 et seq.

b) Even if Plaintiff be permitted to challenge Chapter 876.05 et seq., such provisions of the laws of Florida are valid and constitutional.

Respectfully Submitted,

John Motsinger, Jr.
100 East Robinson Street
Orlando, Florida 32801

[Subscription omitted in printing]

PETITION TO INTERVENE

Comes now FLOYD T. CHRISTIAN, as Commissioner of Education of the State of Florida, by and through his attorney, Earl Faircloth, as Attorney General of the State of Florida, and respectfully petitions this Honorable Court for an Order permitting him to intervene as a party defendant in this cause, to participate in the pretrial conference scheduled in this cause, to participate in the trial before the three judge court and subsequent to trial make such argument and submit such briefs as the Court may permit.

NOTICE OF HEARING

Notice is hereby given that this Petitioner will bring the foregoing Motion on for hearing before the Honorable George C. Young at the pretrial conference scheduled in this cause at 9:00 o'clock A.M., April 9, 1969, in Orlando, Florida.

EARL FAIRCLOTH,
Attorney General

Rivers Buford, Jr.
Assistant Attorney General
The Capitol
Tallahassee, Florida
Attorneys for Floyd Christian

[Subscription omitted in printing]

[Caption omitted in printing]

ORDER

[Granting Intervention]

FLOYD T. CHRISTIAN, as Commissioner of Education of the State of Florida, by and through his attorney, Earl Faircloth, as Attorney General of the State of Florida, has filed a petition to intervene in this cause and has set the petition for hearing before this Court at the time of the pre-trial conference. However, counsel for both the plaintiff, STELLA CONNELL, and the defendants, JAMES M. HIGGINBOTHAM, as Superintendent of the Orange County Board of Public Instruction, et al, have orally advised this Court that they have no objection to the Court granting the petition to intervene and it is, therefore, unnecessary to hold a hearing on the aforesaid petition. Accordingly, it is,

ORDERED that the petition to intervene be and is hereby granted and FLOYD T. CHRISTIAN, as Commissioner of Education of the State of Florida, be and is hereby made a party defendant in this cause and as such shall follow the briefing schedule set forth in this Court's order of March 18, 1969, and the pre-trial conference and trial dates shall remain as set forth in said order. The defendant, FLOYD T. CHRISTIAN, shall file his answer and serve copies thereof on opposing counsel no later than April 3, 1969.

DONE and ORDERED in Chambers at Orlando, Florida, this 28th day of March, 1969.

UNITED STATES DISTRICT JUDGE

Copies mailed to:

Jerome J. Bornstein, Esq.
125 South Court Avenue
Orlando, Florida

Tobias Simon, Esquire
223 S. E. First Street
Miami, Florida 33131

John Motsinger, Jr., Esq.
100 East Robinson Street
Orlando, Florida 32801

Rivers Buford, Jr., Esq.
Assistant Attorney General
The Capitol
Tallahassee, Florida

[Caption omitted in printing]

ANSWER

FLOYD T. CHRISTIAN, as Commissioner of Education of the State of Florida, by and through his attorney, Earl Faircloth, as Attorney General of the State of Florida, for his answer to the Plaintiff's Complaint says:

I.

He denies that the amount in controversy herein exceeds the sum of $10,000.00, exclusive of interest and cost.

II.

He is without knowledge as to the matters contained in paragraph II of said Complaint and, therefore, neither admits nor denies said allegations, but demands strict proof thereof.

III.

He denies that the Plaintiff represents a class of employees of the State of Florida and denies the authority of the Plaintiff to represent any class of employees of the State of Florida.

IV.

He admits the allegations contained in paragraph IV of the Complaint.

V.

He admits the allegations of paragraph V of the Complaint.

VI.

He denies the allegations contained in paragraph VI of the Complaint.

VII.

He denies the factual allegations contained in paragraph VII and the several subparagraphs thereof of said Complaint.

EARL FAIRCLOTH
Attorney General

RIVERS BUFORD, JR.
Assistant Attorney General

ATTORNEYS FOR FLOYD T. CHRISTIAN, Commissioner of Education
The Capitol
Tallahassee, Florida 32304

[Subscription omitted in printing]

[Caption omitted in printing]

HEARING ON TEMPORARY INJUNCTION

Hearing of the above held before the Honorable George C. Young, United States District Court Judge, at Orlando, Florida, commencing on March 17, 1969.

APPEARANCES:

JEROME J. BORNSTEIN, ESQUIRE
ROBERT G. PETREE, ESQUIRE
125 South Court Avenue
Orlando, Florida

Appearing on behalf of the Plaintiff.

JOHN MOTSINGER, JR., ESQUIRE
GEORGE W. JOHNSON, III, ESQUIRE
100 East Robinson Street
Orlando, Florida

Appearing on behalf of the Defendants.

[Excerpts from Direct Testimony of Mrs. Estelle Banks]

[85] BY MR. BORNSTEIN:

Q. Mrs. Banks, did you interview Mrs. Connell at that time that she appeared before you? A. Yes, I interviewed her.

Q. Did you advise Mrs. Connell you needed a teacher who would stay at Callahan for the balance of the school year? A. I can't say that I said that. I don't remember saying that because at the time I interviewed her I was interviewing others.

Q. Did you say that to all the persons who applied for that fourth grade position? A. I never tell a person what

may happen or may not happen. I only say to the individual that I will do the best I can "to help you".

Q. Were you seeking an applicant who would remain at Callahan and teach this new fourth grade section for the balance of the school year? A. Providing they could do the job.

Q. This was not a one, two or three week employment, was it, if they did the job? A. Well, it takes time for you to observe the person and not knowing Mrs. Connell–

Q. Mrs. Banks, my question is if a person did the job and [86] properly taught the fourth grade class, would he or she then have finished the school year with you? A. Yes, if he or she could do the job.

Q. Has Mrs. Connell been teaching at Callahan Elementary School? A. Yes.

Q. What grade has she been teaching? A. The fourth grade.

Q. And is this the new fourth grade section that was formed at Callahan? A. Yes.

Q. Has any other teacher ever taught that particular section? A. No.

Q. When did Mrs. Connell first start teaching at Callahan Elementary School? A. January 27th.

Q. Was that the beginning of the six week period–

THE COURT: What year?

THE WITNESS: 1969.

BY MR. BORNSTEIN:

Q. Was that the beginning of the six week period, Mrs. Banks? A. I wouldn't be able to say whether it was the beginning of the six weeks period or not. I don't have the schedule before me.

Q. Has Mrs. Connell been teaching continuously at Callahan since January 27, 1969? [87] A. Yes.

Q. During this period of time has she had occasion to complete report cards for the children that she teaches? A. Yes.

Q. During this period of time have the teachers at Callahan been paid by the School Board?

MR. MOTSINGER: Your Honor, I object to what other teachers might have done. I think the question that is before this court relates to this plaintiff sitting here.

THE COURT: Overruled. Have the teachers been paid?

THE WITNESS: Yes.

BY MR. BORNSTEIN:

Q. Do you know whether or not Mrs. Connell has been paid since January 27, 1969? A. I wouldn't know the answer to that question.

Q. You don't know. Have you had any communication with Mr. Higginbotham or with any of the other officials of the School Board regarding Mrs. Connell's teaching at Callahan Elementary School? A. In what way?

Q. Did you call anyone at the School Board and tell them that you had selected Mrs. Connell—

MR. MOTSINGER: Your Honor, I object to that question unless the plaintiff was present.

[88] MR. BORNSTEIN: Your Honor, I asked what this witness did herself.

THE COURT: She may answer it.

You may answer the question, Mrs. Banks.

THE WITNESS: Will you state your question again?

THE COURT: Restate it, Mr. Bornstein.

BY MR. BORNSTEIN:

Q. After you interviewed Mrs. Connell, did you call Mr. Higginbotham or anyone else at the School Board Office to advise them of your decision regarding Mrs. Connell? A. No, I didn't call anyone but I filled out a form.

Q. Did you bring a copy of that form with you? A. No.

Q. Can you state what that form sets forth?

MR. MOTSINGER: Your Honor, the form itself would be the best evidence. I object to that question.

BY MR. BORNSTEIN:

Q. Was that form submitted to the School Board Office? A. Yes.

Q. Have you had any occasion to discuss Mrs. Connell's teaching at Callahan since January 27, 1969, with any member of the School Board or any staff on the School Board? A. As to what?

Q. As to anything? A. Yes, I may have talked but not on a professional basis, I [89] wouldn't say, but I have made mention of some things pertaining to Mrs. Connell.

Q. With whom would you have had this discussion? A. The Area Supervisor.

Q. Who would that be? A. Mrs. Loren.

Q. Do you remember when that was? A. No.

Q. Do you remember what you told Mrs. Levine? A. I told her that until Mrs. Connell is able to control her children that she would not become a very good teacher.

Q. Is that all that was discussed between you and Mrs. Levine? A. I didn't say Mrs. Levine, I said Mrs. Loren. It had to do with her pupils, that is all.

Q. Did you discuss Mrs. Connell with anybody else in the School Board Office or the School Board itself? A. I don't recall.

Q. As Principal of Callahan, Mrs. Banks, how do you know a person is going to be permitted to teach at your school? A. If you cannot handle children, you can't teach.

Q. I am talking about officially? A. Do I get what?

Q. Do you get some official notification that a person can teach at your school? In other words, can any stranger walk up to you and start teaching at your school? [90] A. I might get a telephone call which says that it will be all right for this person to start working.

Q. From whom would this telephone call come from? A. From the Personnel Department.

Q. Did you get such a telephone call with regard to Mrs. Connell? A. Yes.

Q. From whom did this call come from? A. The Personnel Department.

Q. Would that be Miss McDonald? A. Miss McDonald.

Q. What did Miss McDonald tell you at that time? A. That is was okay to go on and use Mrs. Connell if I wanted her.

Q. Was this before January 27? A. Yes, it had to be since she started on the 27th.

Q. Has anyone advised you since Mrs. Connell started that it was not all right for Mrs. Connell to continue teaching at Callahan? A. No.

* * *

[Excerpts from direct Examination of Mrs. Pauline McDonald]

[98] MR. BORNSTEIN: It was just in her file, Your Honor.

THE COURT: When did you get the file?

MR. BORNSTEIN: Under the subpoena duces tecum. It has not been in my possession.

THE COURT: This is the file that you brought with you today?

THE WITNESS: Yes.

THE COURT: All right. Without objection plaintiff's 1 and 2 are admitted. The objection to plaintiff's no. 4 is overruled and it will be admitted as No. 4.

(Thereupon, the documents last above referred to were received and marked in evidence as plaintiff's exhibits 1, 1, 2 and 4.)

BY MR. bornstein

Q. Miss McDonald, did you initially interview Mrs. Connell? A. Yes.

Q. Did you and Mrs. Connell have a discussion regarding the salary for a person of Mrs. Connell's qualifications? A. Just as I interview every prospective teacher. We have a salary schedule and if their certificate is in order and if everything pans out, then yes.

Q. What would be the rank and salary for a person with a Bachelor's Degree? A. That would be a rank three certificate.

[99] Q. Is there a difference in salary between a rank three certificate and a substitute teacher? A. Yes.

Q. Can you state what the qualifications are for a substitute teacher? Are they less qualifications then for the rank three teacher? A. It depends upon how many col-

lege credits they have in getting the certificate – it may be rank five, rank six or rank four certificate.

Q. Let me rephrase my question. Does a substitute teacher have to have a BA Degree from a credited college university? A. No sir.

Q. A substitute teacher accordingly would draw lesser pay? A. Yes, but we do have substitutes with college degrees.

Q. You do have substitutes with college degrees? A. Yes.

Q. But you do not have persons with rank three who do not have college degrees? A. That's right.

Q. In other words, the substitutes may or may not have a college degree, but is there a difference in the application form filled out by one applicant for rank three and one for a substitute teacher? A. No, it is the same form.

Q. Is this form submitted to Tallahassee or a copy submitted to [100] Tallahassee? A. Yes.

Q. Is that for the purpose of getting a certification? A. Right.

Q. Is there a difference in the fee charged by Tallahassee depending on whether you are applying for rank three or teacher's certificate or a substitute certificate? A. Yes.

Q. Would you state what that difference is? A. If you are applying for a regular teacher teaching certificate, the fee is $10.00.

Q. And if you are applying for a substitute certificate? A. There is no fee for a substitute teaching certificate.

Q. Do you know whether or not Mrs. Connell submitted a fee with her application to Tallahassee? A. I have not seen the application to Tallahassee for a certificate from Mrs. Connell.

Q. Is the form that goes into Tallahassee in order to get certification, Miss McDonald, is that acquired from your office? A. Yes, it is. It could be-she could write to Tallahassee also to get this form, but we do have them.

Q. Then the applicant for the job submits that to the Department of Education, himself or herself directly, and

not through your office, is that correct? A. I would say that if she had submitted this through our office [101] that they get the certificates much quicker. However, they may submit them directly to the Certification Department.

Q. Do you know whether Mrs. Connell submitted her application for certification through your office? A. No sir, I am sure she has not.

Q. Normally, are teachers employed before certification is obtained?

MR. MOTSINGER: Your Honor, I object to that question unless he is going to state what he means by "employment."

THE COURT: Well, put on the payroll—is that what you are talking about, Mr. Bornstein?

MR. BORNSTEIN: I will break it down then, Your Honor.

BY MR. BORNSTEIN:

Q. Can a person begin teaching before he or she has received his or her official certification from Tallahassee?

MR. MOTSINGER: Your Honor, I would object to that question on the basis that this witness is not qualified to testify to that. I think possibly the Superintendent of the Board could testify to that.

THE COURT: I will hear her answer and then decide whether or not she is qualified.

(Last question read back by court reporter)

THE WITNESS: Yes, they can teach before they have a certificate.

* * *

[113] STELLA CONNELL,

having been produced and first duly sworn as the plaintiff herein, [114] testified as follows:

DIRECT EXAMINATION

BY MR. BORNSTEIN:

Q. Mrs. Connell, would you state your name, please? A. Stella Connell.

Q. Where do you live, Mrs. Connell? A. 1311 South Osceola.

Q. That is here in Orlando? A. Yes.

Q. Are you presently teaching the fourth grade at Callahan Elementary School in Orlando? A. Yes, I am.

Q. How long have you been teaching at Callahan? A. Since January 27, 1969.

Q. Referring you now to the period prior to January 27, 1969, did you make application for a teaching position at the Orange County School Board Office? A. Yes, I did.

Q. Do you recall approximately when that was? A. Approximately–

Q. Let me hand you exhibit no. 1 introduced in evidence here. A. January 16, 1969.

Q. That is in '69? A. Yes.

Q. Now, on that day did you complete exhibit no. 1 in evidence? [115] A. Yes, I think so. Well, I didn't write all of this.

Q. Is this your signature on exhibit no. 1 (indicates)? A. Yes, but isn't that part of it? (indicates)

Q. Just this two page document, exhibit no. 1? A. Yes.

Q. Did you complete this on January 16, '69? A. Yes.

Q. Did you speak to anyone at that time at the School Board Office regarding employment? A. Yes.

Q. To whom did you speak? A. To Miss McDonald.

Q. That is Miss Pauline McDonald? A. Yes.

Q. Who testified earlier? A. Yes.

Q. Did you discuss with Miss McDonald the possible teaching vacancy in Orange County? A. I don't remember.

Q. Well, did you have a later appointment with Miss McDonald? A. Yes.

Q. Do you recall approximately when that was? A. Maybe about a week later or—no, I can't remember. It was less than a week later.

Q. Was it before January 27? [116] A. Yes.

Q. In other words, did you see Miss McDonald on more than one occasion between January 16 and January 27, 1969? A. Yes.

Q. On one of these occasions did you discuss with Miss McDonald the possible teaching vacancy in Orange County, Florida? A. Yes.

Q. Would you describe to the court the context of your discussion with Miss McDonald, very briefly, if you would, please? Let me rephrase it this way. Did you ask Miss McDonald or tell her that you were accepting permanent employment? A. Yes, I did.

Q. Was there any discussion between you and Miss McDonald regarding substitute teaching? A. No.

Q. Did you tell Miss McDonald you had a Bachelor's Degree, from a credited university? A. Yes, I did.

Q. Did Miss McDonald tell you what rank and what salary someone with those qualifications would receive? A. Yes.

Q. Now, do you have a degree from a credited college university? A. Yes.

Q. What university is that? [117] A. The University of California.

Q. What did Miss McDonald tell you with regard to a person of your qualifications, insofar as salary is concerned? A. I believe she said that the salary for someone of my

qualifications would be $6,000, paid over a ten month period.

Q. Was there any discussion whatsoever between you and Miss McDonald concerning substitute teaching? A. No, not at all.

Q. Did Miss McDonald advise you on one occasion or one of these interviews concerning the teaching vacancy in Orange County, Florida? A. Yes.

Q. Did she send you to make application to one or more than one school? A. Not to make application.

Q. To interview Principals? A. Yes, to talk to Principals.

Q. Now, to what schools did she direct you to speak to the Principal? A. Let's see—I went to Orange Center Elementary School. Richmond Heights Elementary School. Washington Shores Elementary School and Callahan Elementary School.

Q. Now, were all of these schools looking for a permanent teacher? A. As far as I know they were.

[118] Q. Is this what Miss McDonald told you? A. Yes.

Q. Did you discuss your application as a teacher with the Principals of each of those schools? A. What do you mean discuss?

Q. Did you talk to the Principal of each of those schools? A. Yes, I did.

Q. Did any of those Principals indicate their acceptance of you as a teacher in their school? A. Only one.

Q. Which one was that? A. That was Mrs. Banks of Callahan.

Q. Did Mrs. Banks ask you to come and teach at Callahan? A. Yes.

Q. Can you recall what she told you? Did she question you with regard to your qualifications—your experience? A. Yes.

Q. What happened at that time? A. She asked me some questions about my experience and she told me about the vacancy that she had open, and she asked me—she said that she had that opening and I said, "Well, does that mean you would like me to come and teach here?" Because I didn't

quite understand if she was actually saying that I could come and teach or not, and she said, "yes", and I said, "Well, I want to think about it for awhile and that I would [119] call her."

Q. Did she tell you how long this position would last? A. Well, I don't remember if it was at that time or the next time that I talked to her that she said, "Now, I want you to promise that you will stay until the end of the year because I need someone who will stay and who is not going to leave." And I said that if I took the position, "Yes, I would stay."

Q. Now, did you call Mrs. Banks and tell her that you would take the position? A. Yes, I did.

Q. Do you recall how long before January 27 this could have taken place? A. Less than a week—January 27 was a Monday, I believe I called her on the Wednesday before.

Q. Did you start teaching at Callahan on January 27, 1969? A. Yes.

Q. Have you been teaching there every day since that time? A. Every day but today.

Q. Today is your first absence? A. Yes.

Q. Do you teach the fourth grade class there? A. Yes.

Q. Is this a fourth grade class that was formed out of the existing fourth grade classes? [120] A. Yes as far as I know.

Q. Have you filled out report cards for these children? A. Yes, I have.

Q. Have you done everything that the other fourth grade teachers have done since you started working at Callahan? A. I have tried to.

Q. Have you received any money or other compensation since you began working? A. No.

Q. Were you advised by anyone that unless you signed the oath that you would not get paid? A. Yes.

Q. Who told you that? A. Miss McDonald.

Q. Now, let me ask you, Mrs. Connell—I hand you first exhibit no. 6 and ask if you can identify that? A. Yes, I can.

Q. Would you state what that is? A. Well, this is one of the papers that was given to me down at the School Board Office after I started teaching—one that was given which is the loyalty oath to sign.

Q. This is a paper the School Board Office gave you? A. Yes.

Q. Did you sign it? A. No.

[121] Q. Have you refused to sign it? A. Yes, I have.

Q. Do you still refuse to sign it? A. Yes, I do.

Q. I hand you exhibit no. 7 and ask if you can identify exhibit no. 7? A. Yes, this is the revised loyalty oath you showed me.

Q. In other words, exhibit no. 7 is the one that I handed you? A. Yes.

THE COURT: Have you refused to sign that?

THE WITNESS: Yes, I have.

THE COURT: What portion of it do you object to?

THE WITNESS: Well, I think I object to the whole thing

THE COURT: The whole thing? Let me read it.

THE WITNESS: The idea of the oath, per se.

THE COURT: Do you object to support the constitution of the United States?

THE WITNESS: Sir, I don't object really to any of the words. I object to the principle of teachers especially being singled out as having to prove somehow their loyalty, supposedly by signing the oath, but there are not any words that I object to.

THE COURT: You think that the teachers are singled out?

THE WITNESS: I guess the statute says employees of the [122] State, yes.

BY MR. BORNSTEIN:

Q. Mrs. Connell, do you recall when I asked of you whether you would be willing to subscribe to an affidavit

or oath that said that you would support and defend the Constitution of the United States and the State of Florida– do you recall what your answer was at that time? A. Yes, I said that I would sign that.

Q. Now, with regard to the balance of it–

THE COURT: Are you trying to impeach what she just told the court?

MR. BORNSTEIN: I am trying to clarily it, Your Honor, not impeach her.

THE COURT: Well, that leaves me in a quandary exactly what it is that she objects to in this oath, as to what she told me.

As you told me, you objected to the whole oath. Is that the objection?

THE WITNESS: I would sign the oath that Mr. Bornstein just stated, which is stated in the affirmative. It says that you will support and defend. But this says that you won't do this and you have not done that. It seems to make a difference.

THE COURT: Let me see what it says that you have not done. What part of this plaintiff's no. 7 refers to [123] the past as distinguished from the present?

THE WITNESS: It seems to be written all in the present tense.

THE COURT: All right. You may proceed, Mr. Bornstein.

MR. BORNSTEIN: Thank you, Your Honor.

BY MR. BORNSTEIN:

Q. To go back, were you advised by a person from the School Board Office that you would not be paid or that your name would not be included on the payroll unles the loyalty oath were executed by you? A. Yes.

Q. Would you state who that was? A. That was Miss McDonald.

Q. And you have not been paid to this date, have you? A. No.

Q. Mrs. Connell, I hand you exhibit 5 and 8 that are plaintiff's exhibits for identification at this point, and ask you if can identify those two exhibits? A. Yes, I can. I received these in the mail.

Q. Did you receive them from the State Department of Education at Tallahassee? A. Yes.

Q. Had you made application to the State Department of Tallahassee for certification? A. Yes, I had.

[124] Q. Was this a response to your application for certification? A. Yes—one of the responses.

Q. Was this the most recent response that you received? A. Yes.

* * *

[126] CROSS EXAMINATION
[Mrs. Connell]

BY MR. MOTSINGER:

Q. Mrs. Connell, is it your testimony that the only thing that you have received from the State Department of Education of the State of Florida is plaintiff's numbers 5 and 8? A. No, I have received other communications from them.

Q. Were you served with a subponea to bring certain instruments to this hearing? A. Yes, I didn't get asked for communications from the School Board—I don't have any—I brought whatever I had.

Q. You don't have any communications of any sort, either in writing or in memo form in any way between you and the School Board of Orange County? A. No, I don't.

Q. Well, the subponea also said any documents pertaining to potential employment with the Board of Public Instruction. Is it your testimony then that you have received other documents from the State Department of Education other than [127] exhibits 5 and 8? A. Yes, I have.

Q. What are those documents? A. I received either one or two—I can't remember, notices telling me what informa-

tion was missing on my application. I guess they keep you informed as to what things you have to get in.

Q. But you had not received the Florida State Teacher's Certificate, is that correct? A. No.

Q. By no, do you mean you have not received it or no, that isn't correct? A. I have not received it.

Q. And your testimony a few minutes ago when His Honor was questioning you about this exhibit 7, which is the loyalty oath, that the School Board asked you to sign was that you did object to the whole thing? I didn't understand your testimony exactly. A. Yes sir, I do.

Q. In other words, there is no particular part that you particularly dislike, but you just dislike it all, is that right? A. That's right.

MR. MOTSINGER: I don't have any further questions, Your Honor.

[128] THE COURT: You say your husband is not employed?

THE WITNESS: No sir.

THE COURT: What is his occupation?

THE WITNESS: He is an artist.

THE COURT: He is an artist?

THE WITNESS: Yes.

THE COURT: And he is not employed?

THE WITNESS: No.

THE COURT: Does he work at being an artist?

THE WITNESS: Oh, yes.

THE COURT: He is not physically disabled?

THE WITNESS: No.

THE COURT: But he is just not making any money?

THE WITNESS: That's right.

THE COURT: All right. How old is he?

THE WITNESS: Twenty-eight.

THE COURT: All right. You may step down. Thank you.

(Witness excused)

MR. BORNSTEIN: We have nothing further to offer, Your Honor.

MR. MOTSINGER: The defendant has no witnesses, Your Honor.

THE COURT: All right. Both sides have rested as far as the evidence is concerned?

MR. MOTSINGER: Yes sir.

* * *

[139] [Oral opinion of Judge Young denying the Plaintiff's Motion for a Temporary Restraining Order.]

THE COURT: From the facts as the evidence indicates, the plaintiff in this case stands in the position that she finds herself in at this time because of the refusal to sign the loyalty oath. Stripped of all other considerations, that is the basic problem.

Now, this court today is not empowered to decide the issue of the constitutionality or the lack of constitutionality of the loyalty oath as presently [140] modified and as set forth in plaintiff's exhibit no. 7.

The plaintiff in this case knew very shortly after entering into the teaching at Callahan of the requirements of the loyalty oath and the problems in connection therewith. This suit followed shortly thereafter and as a matter of fact as counsel are aware, the court was advised a week or two ago and time sought on the calendar before even the filing of this suit because the problem had arisen, so this is not a case as in the case of Cramp, where a teacher had been teaching for many years, and this problem arose, and then the teacher was discharged or sought to be discharged because of the failure to sign a loyalty oath. Rather, this is the case of a teacher at the time of seeking to enter into permanent employment, refusing to sign the oath.

Now, the plaintiff by her statement here has said that she objects to the signing of any loyalty oath.

Now, any discharge at this time, if there be any, is not as implied by counsel for the plaintiff, carrying with it overtone or undertones of loyalty or disloyalty. That is not the issue. The issue is not any disloyalty on the part of the plaintiff—her [141] loyalty or lack of loyalty or patriotism is not in issue in this case. It is not in question.

The sole issue is whether she will sign any loyalty oath or particularly in this case the loyalty oath as set forth in plaintiff's exhibit no. 6. If it is unconstitutional, of course, she is not required to sign it and any action the Board might take in connection with this would be at the Board's peril, but at this time it has not been demonstrated that the loyalty oath as modified is prima facie unconstitutional nor has it been demonstrated that the plaintiff under the circumstances of this case having just been employed will suffer irreparable harm by the denial of the temporary restraining order. Any loss of position or loss of wages, if there be any, all those matters can be remedied by the final order in this case, if it is found that the merits lie with the plaintiff.

I cannot find that under the circumstances of this case as they have arisen, that this plaintiff will suffer irreparable damage that cannot be remedied for which she cannot be compensated, in the absence of the granting of the temporary restraining order.

Consequently, the temporary restraining order will be denied and we will set now for a hearing the case before the three-Judge court and we will set a briefing schedule on this issue.

Now, the reason that I had suggested, Mr. Motsinger, that, you know, that the Statute says the trial is before the three Judges and that is what you are entitled to, but as I pointed out, the primary issue in this case before the three Judges it seems to me now—I am subject to your showing me to the contrary, is going to be the law as to whether or not the

wording of this modified oath is constitutional or unconstitutional. Doesn't it boil down to that?

* * *

[149] JAMES M. HIGGINBOTHAM,

having been produced an first duly sworn as a defendant herein, testified as follows:

DIRECT EXAMINATION

BY MR. BORNSTEIN:

Q. Would you state your name, please? A. James M. Higginbotham.

Q. What is your address, Mr. Higginbotham? A. 2614 Ardsley Drive, Orlando.

Q. Would you state what your occupation is? A. Superintendent of Public Instruction.

Q. How long have you been so employed? A. Three and a half months.

Q. Have you been employed by Orange County Board of Public Instruction prior to your becoming Superintendent? A. Yes sir, for approximately thirteen years.

Q. In what capacity? A. As a teacher, elementary principal, high school principal, high school coordinater, and assistant superintendent of public instruction.

Q. You have had experience in every phase of board administration procedure? A. Several.

Q. With regard to the position of a principal, regarding [150] employment, would you state what that is? A. A principal may seek an applicant, assuming he has an open position and one that is vacated, after an official session and as a result of an addition to his faculty, he can seek an applicant directly or it can come through the personnel office. If it comes through the personnel office, those people who are available and appear to have the qualifications we

are seeking are sent out to be interviewed and then he is entered for nomination provided the requirements are met.

Q. I hand you plaintiff's exhibit no. 2 and ask if this is the nomination form that you just mentioned? A. That is the nomination for appointment of teacher form which is the standard form in our county.

Q. Once that form is entered, what is the general practice and procedure that is followed? A. To complete whatever personnel records are necessary to obtain any additional references which may be necessary, and then for me to enter into a recommendation to the Board.

Q. If all of the recommendations and qualifications and everything else—all of the documentation that is required is completed and is in order, does your recommendation generally follow on a contract issue? A. Would you define what you mean when you say in order?

Q. The necessary references, health certificates, certification, college degree, all of the various documents that are [151] required by the Department of Public Instruction at Tallahassee and your own office? A. Yes, sir, normally.

* * *

[154] Q. Now, do the personnel records indicate when Mrs. Connell started employment or started teaching at Callahan Elementary School? A. The nomination is dated January 28, 1969.

Q. Would that indicate whether teaching duties started before or after that date? A. Not necessarily. These particular records don't. I assume you don't have any which does. This is a photostat, I believe, of what you already have.

Q. Do you know when the first pay period following January 27 or the 28th, 1969 was? A. Yes, sir, it would have been around the 20th of February.

Q. Do you know whether Mrs. Connell got paid on or about that [155] date? A. No, she did not.

Q. Do you know the reason for her failure to get paid at that time? A. Yes sir, she had not been employed by

the Board. She had not been recommended by me to the Board for employment and there were documents missing from her personnel record which would have been necessary under the statute for her to receive a pay check.

Q. What documents were missing from her file before she received her check? A. There was certain evidence—one which was not there and, the loyalty oath, which is required.

THE CLERK: Plaintiff's exhibit no. 5 for identification. . . . Thereupon, the document last above referred to was received and marked as plaintiff's exhibit no. 5 for identification.

BY MR. BORNSTEIN:

Q. Mr. Higginbotham, I ask you to look at plaintiff's exhibit no. 5 for identification and ask you if you know what that is? A. The official receipt for payment of fee and application for certificate, and it is based on the presumption of MFP salary program, rank three. It is dated also, incidentally, March 10, 1969.

[156] Q. Now, according to this, would this indicate that all the documentary requirements of the State Department of Education have been fulfilled and a certificate would be issued in full force—

MR. MOTSINGER: Your Honor, I do object to this exhibit being introduced into evidence.

THE COURT: Sustained. March 10 did you say?

THE WITNESS: Yes sir, that is the date on this.

THE COURT: That is after this suit was filed.

THE WITNESS: 3/10/69.

MR. BORNSTEIN: Yes, sir.

THE COURT: All right.

BY MR. BORNSTEIN:

Q. If a document of that kind had been included in Mrs. Connell's file prior to the pay period of February 20, would Mrs. Connell have been paid?

MR. MOTSINGER: Your Honor, I object to that question. He stated that her name would have to come before the Board first and by this question he is asking—

THE COURT: If Mr. Higginbotham can answer, he may do so.

THE WITNESS: She might have been paid and might not, depending on the timing involved in it—when the nomination went in.

BY MR. BORNSTEIN:

Q. If this document marked exhibit no. 5 for identification is [157] now included in Mrs. Connell's file, will she be paid by the School Board for her services during the next pay period? A. No sir.

Q. Why not, Mr. Higginbotham? A. Because there is no loyalty oath as required by the statute.

Q. Is there any other reason that she would not be included? A. She has not been recommended for employment as of this time by me, and has not been employed by the Board.

Q. As a matter of normal procedure, if this loyalty oath had been signed and that document marked exhibit no. 5 for identification had been in there—in Mrs. Connell's file, would she have been recommended for employment by the Orange County Board of Public Instruction?

MR. MOTSINGER: I object to that question, Your Honor. He is asking for pure conjecture on the part of the witness.

THE COURT: I am going to sustain the objection.

BY MR. BORNSTEIN:

Q. Do you know of any reason why Mrs. Connell would not have been recommended for employment and a contract issued by the Orange County Board of Public Instruction other than the lack of certification by the State of Florida and the failure to sign the loyalty oath? A. Now, when you say do I now—do you refer to right now this minute?

[158] Q. Right now, this minute, yes sir. A. Yes sir, I heard something in the way of a question of the principal's testimony so I do not know whether this nomination still stands.

Q. Prior to today was there anything in your knowledge or that had come to your attention which would have prevented you from recommending this particular teacher for employment by the Orange County School Board? A. Other than these two things, no.

Q. What is the normal time period between the commencement of teaching and the recommendation by you to the School Board for employment?

MR. MOTSINGER: I am sorry. I didn't hear that question.

May I have that read back madam reporter?

(Last question read back by court reporter)

BY MR. BORNSTEIN:

Q. Do you understand that question? A. I am not sure I can answer it in terms of normal time. Do you want ranges?

Q. If that would help. A. Well, probably five days minimum and three or three and a half months maximum.

THE CLERK: Plaintiff's exhibit no. 6 for identification.

. . . Thereupon, the document last above referred to was received and [159] marked as plaintiff's exhibit no. 6 for identification.

BY MR. BORNSTEIN:

Q. During this range that you have mentioned, would an employee normally receive his or her salary during that period of time? A. Yes, sometimes it would be based on rank and experience, in the case of a certificate in hand or a receipt in hand which indicates the MFP salary rank, and on whether it would be a substitute basis and it was substantiated, then the employment would be retroactive to that point.

Q. I hand you exhibit no. 6 for identification and ask if you can identify that? A. It is the loyalty oath that we used at one time.

Q. When did you discontinue using that form, Mr. Higginbotham? A. A month or six weeks ago approximately.

Q. That would be on or about the 1st of February? A. Ordinarily after that.

Q. Do you know whether or not exhibit 6 for identification is the form of loyalty oath given to Mrs. Connell for signature? A. I was not present when she was given one so I do not know of my own knowledge.

Q. Do you know under what circumstances this particular form of loyalty oath was discontinued? A. The attorney called and told me to.

Q. Which attorney was that? [160] A. Mr. Johnson.

Q. In other words, Mr. Johnson called you and told you exhibit no. 6 for identification to discontinue using the form, which was the form that your office was using? A. Yes sir, this is correct.

Q. Do you have anything in your records which would identify and designate the date when exhibit no. 6 was discontinued? A. No sir, I don't.

THE CLERK: Plaintiff's exhibit no. 7 for identification.

. . . Thereupon, the document last above referred to was received and marked as plaintiff's exhibit no. 7 for identification.

BY MR. BORNSTEIN:

Q. Mr. Higginbotham, can you identify exhibit no. 7 for identification? A. It is the form which we presently use.

Q. Exhibit no. 7 then is the form that you are using since Mr. Johnson called no. 6 to your attention? A. Yes sir.

Q. Do you know, Mr. Higginbotham, whether or not the discontinuance of the loyalty oath shown as exhibit no. 6 was the result of Mrs. Connell and this present controversy?

A. Not of my own knowledge, no sir. It was Mr. Johnson's instructions to me and when he said to discontinue it, we did.

[161] Q. And he didn't tell you why? A. Not at that time no. I heard later it was, but I cannot answer your question positively of my own knowledge.

Q. In other words, so far as you know all of the teachers would have signed the loyalty oath prior to about February 1, 1969, would have signed the form shown as no. 6 for identification here? A. Yes.

Q. Do you know whether or not a teacher must sign the loyalty oath each year?

MR. MOTSINGER: Your Honor, I am going to object to this line of questioning. If we are getting into a constitutional law matter here, I think that it is immaterial and I don't think it is before the court. Possibly counsel can tell us for what reason we are going into the loyalty oath now.

MR. BORNSTEIN: This witness has testified that there were two documents that prohibited Mrs. Connell from getting paid and I am trying to find out a little bit of background about these two documents.

THE COURT: What difference does it make what other teachers have?

MR. BORNSTEIN: May I strike that question and rephrase it, Your Honor?

THE COURT: All right.

[162] BY MR. BORNSTEIN:

Q. Is the execution of either plaintiff's no. 6 for identification or no. 7 for identification a condition precedent for employment as a teacher by the Orange County Board of Public Instruction? A. It is a condition preceding the issuance of a pay check. The teacher may well be processed through the Board prior to this happening, however, the check is not issued prior to this occurring.

Q. Does that apply to the substitute as well as regular teachers? A. We require the loyalty oath from substitutes.

Q. You require loyalty oath from all personnel in the School Board? A. I believe this is correct.

Q. Are you familiar with the statute that says that those persons who fail or refuse to sign this oath must be discharged from employment? A. I am familiar with the fact that they cannot be paid but not familiar with the statute.

Q. As Superintendent of Public Instruction, when it comes to your attention that an employee has failed or refused to sign the loyalty oath, would you require that person be discharged?

MR. MOTSINGER: Your Honor, I object to that question.

Again, it is asking for mental processes on the part of the witness. It is immaterial as to this [163] particular plaintiff and it certainly is irrelevant as far as this particular hearing is concerned.

MR. BORNSTEIN: Your Honor, I think it is very relevant as to this particular hearing. It requires of this witness a statement of what he would do in his official capacity as Superintendent of Public Instruction.

THE COURT: In what case?

MR. BORNSTEIN: This case—the Connell case or any other case, what action Mr. Higginbotham deems is required of him as Superintendent of Public Instruction where there is a refusal to sign the loyalty oath.

THE COURT: The statute speaks for itself, doesn't it?

MR. BORNSTEIN: He says the statute only says that he shall not issue a pay check and this is all he knows of the statutes. I am asking him beyond that, Your Honor.

THE COURT: Well, pending—I don't understand why you are asking about the discharge.

MR. BORNSTEIN: I will withdraw that question.

BY MR. BORNSTEIN:

Q. Mr. Higginbotham, are you going to submit Mrs. Connell's name to the School Board for issuance of a contract as teacher with the Orange County Board of Public Instruction?

[164] MR. MOTSINGER: I object to that question, Your Honor. Again, he is asking for mental processes on the part of the witness. There has been no basis of qualifications leading up to this question by which it could be asked and I don't—again, I can't see how it is material or relevant to the cause before the court at this particular time.

MR. BORNSTEIN: Your Honor, part of the relief we seek is suspension of this statute pending a convening of the three-Judge court and I think the attitude and conduct is directly material to the temporary restraining order which we seek.

THE COURT: Do you mean you are seeking to have her employed?

MR. BORNSTEIN: Yes sir, continue in her employment.

THE COURT: Continuing employment and getting a person employed are two different things. Which are you seeking?

MR. BORNSTEIN: We contend, Your Honor, that she is presently employed and that the only reason she does not have a written contract as such, if one is required for employment, and the only reason she has not been paid to date is the failure to execute the loyalty oath.

THE COURT: Well, it hasn't been put in evidence yet—[165] what once are they—plaintiff's 6 and 7?

MR. BORNSTEIN: Yes, Your Honor. Your Honor, we will offer 6 and 7 in evidence at this time, if counsel has no objection.

MR. MOTSINGER: Well, I would object to them being offered into evidence at this particular time, because I think these go to the matter of constitutionality and I don't think they go to the matter before this court. I think they will be a matter of evidence as to this particular matter before the court—

THE COURT: Well, the objection is overruled. They will be admitted, both 6 and 7, not only as to this matter but as I think I indicated to counsel for both sides before this hearing, that we wanted to get all of the evidence in

this case before this court at this hearing so when the three-Judge court meets, all the three-Judge court will have to do is hear the argument and not hear any evidence.

* * *

[168] MR. BORNSTEIN: If the court please, we would ask that the court take judicial notice of Chapter 876.06, Florida Statute, and I would like to read it to Mr. Higginbotham.

BY MR. BORNSTEIN:

Q. Mr. Higginbotham, were you aware that the Florida Statutes require that:

"If any person required by 876.05 - 876.10 to take the oath herein provided or fails to execute the same, the governing authority under which such person is employed shall cause said person to be immediately discharged, and his name removed from the payroll, and such person shall not be permitted to receive any payment as an employee or as an officer [169] whether he or she was serving."

Q. Were you aware of that provision? A. This is assuming that the employment has taken place, is that correct?

Q. I asked if you were familiar with that statute, Mr. Higginbotham? A. The one you just read to me, yes.

Q. Have you been familiar with that provision and customarily, Mr. Higginbotham do you permit persons who are not employed by the School Board to act as teachers in a classroom? A. Yes sir.

Q. Would you state under what circumstances that you permit that? A. When there is not a regularly employed teacher available, as in the case of the absence of a regularly employed teacher, or when a vacancy has been created and the necessary steps and procedures have not been accomplished to employ a regular teacher.

Q. Now, for how long a period do you permit this situation to continue? A. We have under the circumstances gone along with this for four and a half months.

Q. During this period where this situation continues, is that person so teaching submitting the various qualifica-

tions and other requirements in order to get certification? [170] A. In some cases, yes and other cases no.

Q. When would the case be which would be answered no or in the negative? A. Let's assume that we have an opening in X elementary school for the third grade and not able to get a qualified third grade teacher, but do have someone who completed the requirements insofar as the time span is concerned, because of the graduation schedule or some other reason will not be eligible to make application over this period of time to be covered, we would permit that person to serve as a substitute on a day by day basis, then when the documentation could be permitted we would enter into employment, assuming everything was satisfactory.

Q. Taking any example that you want, whether it be substitute or regular, or what have you—given those circumstances where a teacher remains in the classroom, does that teacher get paid for the period during which he or she has been in the classroom either on a substitute or regular basis? A. Yes.

Q. On the substitute basis, when does the teacher get paid? A. Well, it is again on a thirty day breakdown and this is the month end payroll.

Q. And they would have been—A. March 1.

Q. March 1 and March 1 would have been the eligible time that [171] she could have made the payroll? A. Yes.

Q. Now, with specific regard, Mr. Higginbotham, to Mrs. Connell, was Mrs. Connell given any substitute teacher's pay on March 1? A. She was not.

Q. Why not? A. Because she was being considered for permanent employment and had not submitted the necessary documents to complete her status one way or the other.

Q. Was there any other reason by March 1 why she did not receive substitute teacher's pay? A. Her file was not complete.

Q. Did that include the failure to execute the loyalty oath? A. Yes, it did.

Q. If Mrs. Connell does submit an executed loyalty oath and does submit her certification from the Department of Public Instruction at Tallahassee, would she then be paid for the time that she has spent as a regular teacher at Callahan School? A. Not prior to being appointed by the Board and I would have to enter the statement that the principal made here to the Board, at least to the personnel committee to the effect that there appeared to be a problem there now and she would be paid as a substitute, assuming these things, but not [172] necessarily as a regular teacher.

Q. Now, if she fails to sign the loyalty oath, will she be paid as a substitute in that case? A. No, not until I am given some relief in this matter.

Q. Now, we are getting right down to it—unless and until she does sign the loyalty oath she will not be paid anything, will she, Mr. Higginbotham? A. This is correct.

Q. Will you continue her as a teacher at Callahan after today's hearing if she doesn't sign the loyalty oath and unless this court takes action? A. No sir.

Q. Have you personally made any investigation regarding Mrs. Connell's qualifications as a fourth grade teacher at Callahan? A. What do you mean by investigation?

Q. Have you personally investigated as to her qualifications? Have you asked anybody or talked to anybody or have you gotten any personal information regarding her ability as a fourth grade teacher at Callahan? The only thing that you heard derogatory is what you heard in court? A. Have I sought this information, is that what you are asking?

Q. Right. A. No.

Q. The only information you have about Mrs. Connell's qualifications [173] as a teacher is Mrs. Banks' testimony today in court? A. Plus one or two comments which have been volunteered to me.

Q. By whom? A. At this point I honestly don't know, but I have heard the control problem before. I cannot tell you where I got it. I did not seek it.

Q. If nothing is done this afternoon, what would be the basis for your refusal to prohibit Mrs. Connel for reporting for work as a fourth grade teacher at Callahan tomorrow morning? A. The fact that the personnel file has not been completed. This includes the certificate and also includes the loyalty oath and there would be question regarding the principal's recommendation.

Q. Now, if you eliminated all factors other than the loyalty oath, would your statement still be the same, that she would not go to work tomorrow morning? A. Without an order from this court, yes sir, it would still be the same.

Q. Have you talked to the principal at any time regarding Mrs. Connell? A. No sir.

Q. Has the principal ever talked to you? A. No sir.

Q. Is there anything in her personnel file regarding Mrs. Connell's ability as a fourth grade teacher? [174] A. There is nothing at all in her personnel file regarding her ability as a fourth grade teacher.

Q. Would you state for the record the salary, the MFP salary rank three? A. A beginning teacher would be at the rate of $6,000 for 190 days of service—180 days which would have been instruction.

MR. MOTSINGER: I object to this line of questions about salaries unless by some strange manner we are determining whether or not there is a certain amount of money due this plaintiff at this hearing.

THE COURT: Well, I am inclined to agree as to the amount of money, that it is immaterial at this point, but I don't see it makes too much difference. I overrule the objection. Let's proceed on.

MR. BORNSTEIN: We have no further questions from Mr. Higginbotham.

THE COURT: Any cross examination?

CROSS EXAMINATION

BY MR. MOTSINGER:

Q. Mr. Higginbotham, you have testified that before a person may be employed on an annual contract basis that this person must go through a certain procedure and as I recollect, the procedure is an application is filed and they go to the particular principal, you get a certificate from the principal recommending this person and if this person or the State [175] Board presents you with a certificate then at that time is the discretionary time as to whether or not you take the matter before the Board or do you have any discretionary power at that time as to whether or not this person is hired? A. The law requires that the Board do the employing, but the law does not set the period of time during which this application must be taken to the Board.

Q. Do you take this directly to the Board or do you take it to a committee of the Board before it is presented to the Board as a whole? A. I take it first to the committee of the Board which does not have standing in the statute and that committee screens them and we take the recommendation to the Board. We used to have a Board of Trustees. This committee fills the function that the Board of Trustees did fill.

Q. It is your testimony in this cause that number one, you had not received any teacher's certificate required by the Statute of Florida, and number two, that this person has not been presented or recommended to the Board as a teacher? A. This is correct.

Q. As teacher on an annual basis I should say? A. Yes sir.

Q. During the pendency of this person's consideration, in other words, when you are obtaining the necessary information to put in the file to present to the School Board, may you as [176] Superintendent or may one under your authority hire this person as a temporary or substitute teacher? A. We can use this person on a day to day basis to fill vacancies which occur. We cannot, however, enter into permanent employment. The Board does this.

Q. Have you entered into permanent employment with the plaintiff? A. No.

Q. Well, if an applicant does go to the—strike that, please. Pending the application and the filling of the information for the file and the presentation to the Board, do you consider a person such as the plaintiff who was working as a substitute a permanent employee?

MR. BORNSTEIN: Objection, Your Honor. I think the question is leading and calls for a conclusion on the part of the witness and assumes the answer of what is here in litigation.

THE COURT: Well, I think that he can answer the question.

THE WITNESS: No, we do not.

BY MR. MOTSINGER:

Q. Do you have authority to dismiss substitute teachers if the replacement can be found? A. Yes.

Q. I don't remember whether I asked this question or not. Have you recommended Mrs. Connell's employment to the Board? A. No sir, I have not.

[177] Q. So then the Board has not determined whether or not it will award Mrs. Connel a teaching contract? A. No sir, it has not.

Q. Have you met with the committee of the Board of which you spoke in regard to Mrs. Connell? A. No sir, I have not.

Q. Based on the testimony that you have heard today, would you recommend Mrs. Connell for a teacher contract? A. Not without further investigation.

Q. Do you intend to look further into this matter? A. Yes sir.

Q. Mr. Higginbotham, exactly what is the certificate to which the Florida Statute 2314 alludes when it says, "No persons shall be employed to serve in an instructural capacity as a regular or parttime teacher in the public schools of the state who do not hold a valid certificate to teach in Florida, granted or recognized pursuant to law under

regulations of the State Board." A. This is teaching certificate which it can't amount to a license granted by the State Department of Education through their division of certification and it is based on the teacher having met certain basic requirements or on an emergency application having been made in that teacher's behalf, where the teacher has not completed all of the educational requirements for the position for the certificate [178] sought.

Q. Then it is your testimony here today that this plaintiff is merely being considered for employment? A. Yes sir, this is correct.

MR. MOTSINGER: I have no further questions, Your Honor.

REDIRECT EXAMINATION

BY MR. BORNSTEIN:

Q. Mr. Higginbothan, have you talked to Tallahassee regarding Mrs. Connell? A. No sir, I have not.

Q. Nor, to anybody in the Department of Education? A. No sir, I have not.

Q. Have you ever seen this particular form issued by the Department of Education that is here as exhibit no. 5 for identification? A. This particular one?

Q. One like that form? A. You showed me this one and I have seen this form many times.

Q. What is that form, particularly, will you describe it, please? A. This is the receipt for application and fee, in this case of $10.00, and indicates the date the application was made, the name under which the certificate, if issued, will be issued, and is assigned a State Department number which becomes a permanent file number. It also indicates a baccalaureate [179] degree was submitted and that is what rank three is.

Q. On this form does not Tallahassee indicate whether or not there is some documentary requirements that are still absent, if that be the case? A. Normally, if there are any documentary requirements still not in.

Q. In terms of the papers that are required to be submitted for this, this receipt is not issued, isn't that a fact? A. I don't think I remember seeing one of those.

Q. Isn't it a fact that once that certificate is issued—once the receipt has been issued, that the certificate comes through as a matter of course? A. I would expect the certificate, but I can't guarantee it would as a result of this.

THE CLERK: Plaintiff's exhibit no. 8 for identification.

. . . Therefore, the document las above referred to was received and marked as plaintiff's exhibit no. 8 for identification.

BY MR. BORNSTEIN:

Q. In your experience, Mr. Higginbotham, once this receipt is issued doesn't the certificate come through as a matter of course? A. It normally comes through but I don't know that it is automatic.

[180] Q. Normally, it comes through? A. Normally a certificate comes through and it may contain anything on its face and be any rank, but normally one will come through.

Q. Mr. Higginbotham, will you look at plaintiff's exhibit no. 8 for identification. Have you ever seen that form before? A. Yes.

Q. State to the court what that is? A. That is a certificate that can be issued. It does not say what kind or whether that certificate will qualify the person to hold the position for which we are considering.

Q. Would you state out of what office exhibit no. 8 is issued and under what circumstances? A. The State Department of Education, and it comes along with this as a rule (indicates).

Q. When you say this, you are referring to exhibit no. 5? A. Number 5.

MR. BORNSTEIN: Your Honor, we would like to offer exhibit no. 8 into evidence.

THE COURT: Show it to Mr. Motsinger.

MR. MOTSINGER: Your Honor, I would object to this piece of paper. It is a copy that says, "To: Applicant. From: Florida Teacher's Certification Office." It is not authenticated nor certified copy and it really doesn't purport to show anything except that [181] it is a copy of some form that is used by the Superintendent's Office.

THE COURT: Superintendent of whom?

MR. MOTSINGER: The Superintendent of Public Instruction.

THE COURT: All right. Objection sustained.

BY MR. BORNSTEIN:

Q. Mr. Higginbotham, isn't it a fact upon issuance of these pink certificates by the Department of Education that a School Board is authorized to start making a salary payment at that time and afterward?

MR. MOTSINGER: Your Honor, I am going to object to this line of questioning because, number one, the plaintiff hasn't been shown to have a teaching certificate. As a matter of fact, the testimony has been very much the other way, and what might or might not happen after a certificate is issued is immaterial and irrelevant in this cause.

MR. BORNSTEIN: Your Honor, this was not asked with regard to this plaintiff, it was asked with regard to the custom and procedure by the Superintendent.

THE COURT: Which Superintendent?

MR. BORNSTEIN: Mr. Higginbotham.

THE COURT: I thought at Tallahassee.

MR. BORNSTEIN: No sir.

MR. MOTSINGER: Well, Your Honor, I might also say that [182] the testimony has shown that there are other matters that go into the employment of teachers other than just the issuance of a certificate.

THE COURT: You may answer the question, Mr. Higginbotham.

THE WITNESS: We could use this for auditing purposes.

BY MR. BORNSTEIN:

Q. What do you mean by auditing purposes? A. To justify the making of the payment to the person, assuming all other things were correct.

MR. MOTSINGER: Your Honor, I would have to object and ask that be stricken because I don't think this has ever been introduced into evidence and we are asking questions about it.

MR. BORNSTEIN: Your Honor, we will connect exhibit no. 5.

THE COURT: I didn't know you were talking about that.

MR. BORNSTEIN: We are talking generally, Your Honor.

THE COURT: He is talking about no. 8?

MR. MOTSINGER: Yes sir.

THE WITNESS: I answered on the basis of no. 5.

THE COURT: Has no. 5 been admitted into evidence?

MR. BORNSTEIN: It has not been admitted, Your Honor.

THE COURT: Has it been offered?

MR. BORNSTEIN: At this point we have not connected it up. An admission of evidence has been denied through [183] this witness and we will offer it through the plaintiff.

THE COURT: No. 8 has been offered and I sustained the objection but 5 has not been offered.

BY MR. BORNSTEIN:

Q. Mr. Higginbotham, let's go back to exhibit no. 5 for identification. What form would Mrs. Connell first get back from the Department of Education after she submitted her various applications and recommendations for a teacher's certificate from the State of Florida? A. She might get a letter and she might get this official form here—this receipt marked as no. 5.

Q. Are you familiar with the official form such as no. 5—have you seen them before? A. Yes.

Q. Is that customarily issued by the Department of Public Instruction at Tallahassee for teachers who are applying for teacher's certificate? A. I know of no other place they are issued.

Q. To your knowledge, Mr. Higginbotham, is this the regular form issued by the Department of Public Instruction pertaining to Stella Connell's teacher's certificate? A. It is the receipt—it is the regular receipt form for the fee and application papers.

Q. Showing the starting salary and rank? [184] A. No, it doesn't show the starting salary. It shows the rank certificate and the date of application and the name.

MR. BORNSTEIN: Your Honor, we offer this in evidence as plaintiff's exhibit no. 5.

MR. MOTSINGER: Your Honor, I object to no. 5 coming into evidence on the basis that no. 1, this witness is not qualified to identify the official receipt from the Department of Education in Tallahassee. It did not come from his office. And number two, this receipt or what purports to be a receipt is dated March 10, 1969, which is subsequent to the date of the plaintiff's complaint herein or any notices or anything else.

THE COURT: Well, I will sustain the objection at this time on lack of sufficient identification by the witness who neither sent it nor received it.

MR. BORNSTEIN: Your Honor, may we excuse Mr. Higginbotham at this point subject to recall?

THE COURT: Well, any further examination?

MR. MOTSINGER: That is quite all right with me, Your Honor, as long as I have a right to cross examine if he is called again.

THE COURT: You already cross examined. Do you want any recross?

MR. MOTSINGER: Not at this time, Your Honor.

[185] THE COURT: Mr. Higginbotham, as the plaintiff in this case, to your knowledge has she been doing teaching out here at the Callahan School?

THE WITNESS: Yes sir, she has been reported to me as doing teaching in the same fashion as all other teachers reported to me. I have not visited her classroom.

THE COURT: Have you taken any steps to direct that she should stop teaching?

THE WITNESS: No sir.

THE COURT: Well, if the Board isn't going to pay her, are they going to accept her services without pay?

THE WITNESS: We would hope not. We will await instructions from this court.

THE COURT: Well, on a day to day basis—

MR. MOTSINGER: Your Honor, if the court please, on that point counsel for the defendant would be glad to stipulate that this money, whatever sum might be due that hasn't been shown here, will be placed in the registry of the court pending the final determination of this matter.

THE COURT: Well, what I don't understand is, Mr. Motsinger, is allowing a person to continue teaching and making an issue as to whether she is going to get paid or whether she is going to be able to teach?

[186] MR. MOTSINGER: I am sorry, Your Honor, I don't understand the question.

THE COURT: You are letting the plaintiff continue to teach, to provide services, but you are withholding the pay and you are making an issue of whether you are going to pay her rather than whether you are going to let her teach. The purpose of the statute is whether or not a person is going to be able to teach and if there is any danger from failing to sign a loyalty oath, it is in their teaching and not in their receipt of the money.

MR. BORNSTEIN: Mr. Higginbotham, Your Honor, has already stated that unless this court takes action, Mrs. Connell will not be teaching.

THE COURT: I didn't understand that.

THE WITNESS: Yes sir, that is correct.

THE COURT: That is what you contemplate?

THE WITNESS: Yes sir.

THE COURT: That is what I am trying to find out, whether or not this is going to go on indefinitely and that you are accepting her services without payment, but you plan to discontinue her services?

THE WITNESS: Yes sir, this is correct.

MR. MOTSINGER: Your Honor, if the court please, I would like the record to show there was, to my knowledge, [187] a stipulation with counsel for plaintiff that until this matter was heard, the situation as to her employment would not be decided.

THE COURT: That ought to be here on the record, if there was such a stipulation I would like to know what it is and I am sure it ought to be a matter of record what the stipulation is. What was it?

MR. MOTSINGER: Your Honor, the stipulation or at least the agreement with Mr. Bornstein was made by Mr. George W. Johnson, III of my office who on February 21, 1969, wrote Mr. Bornstein and said among other things:

"No change in Mrs. Connel's current status will be made before close of school day on Thursday, February 27." That there would be no change made until the hearing. The hearing as I remember was scheduled for a week ago and that was the stipulation, that it was up to that time.

THE COURT: I see.

MR. MOTSINGER: And also, Your Honor, under Florida law 876.08, there is a penalty. The Statute says:

"Any governing authority or person, under whom any employee is serving or by whom employed who shall knowingly or carelessly permit any such employee to continue in employment after failing to comply with [188] the provisions of 876.05 - 876.10, among other things, shall be guilty of a misdemeanor." So I think Mr. Higginbotham is acting in good faith here in trying to comply with the law of the State of Florida.

THE COURT: Any further questions of Mr. Higginbotham?

If not, you may step down.
(Witness excused)

* * *

[Subscription omitted in printing]

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[206] [Caption omitted in printing]

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PRE-TRIAL CONFERENCE

Pre-Trial Conference of the above held before the HONORABLE GEORGE G. YOUNG, United States District Court Judge, at Orlando, Florida, commencing on April 9, 1969.

APPEARANCES:

JEROME J. BORNSTEIN, ESQUIRE
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Appearing on behalf of the Plaintiff.

JOHN MOTSINGER, JR., ESQUIRE
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RIVERS BUFORD, ESQUIRE
Assistant Attorney General
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Appearing on behalf of the Defendants.

[207] THE COURT: This is a pre-trial conference or a conference in the nature of a pre-trial conference in the case of Stella Connell versus James M. Higginbotham, et al. Appearing here today is Mr. Rivers Buford for the Attorney General, Mr. Motsinger and Mr. Johnson for the de-

fendant School Board, and Mr. Bornstein for the plaintiff.

This case is set for a hearing before a three judge court this coming Friday morning at 10:00.

Now, do you propose to offer any evidence at the hearing Mr. Bornstein?

MR. BORNSTEIN: Yes, we do, Your Honor. We have prepared a list of our proposed witnesses and the documents which will be submitted in evidence.

THE COURT: Have you given a copy of this pre-trial statement to the opposing counsel?

MR. BORNSTEIN: I have, Your Honor.

THE COURT: When did you give it to them?

MR. BORNSTEIN: This morning, sir.

THE COURT: "Do you have any relevant documents produced pursuant to the subpoena duces tecum?" What subpoena duces tecum are you referring to?

MR. BORNSTEIN: In the hands of the Marshal, Your Honor, at this time, are the subpoena duces tecums for Mrs. Banks, [208] Mrs. McDonald and Mr. Higginbotham.

THE COURT: What do they seek to have produced?

MR. BORNSTEIN: Let me start with Mrs. Banks, Your Honor, which is the simplest. All we requested from Mrs. Banks was the daily class attendance for the fourth grade sections for the month of January, 1969.

For Mrs. McDonald, we requested that she bring with her the teacher vacancy list of Orange County elementary schools for the City of Orlando for the period January 1, 1969 to February 10, 1969, together with the rules, regulations or other documents of the Department of Education for the Board of Public Instruction, Orange County, pertaining to:

A: Teacher qualifications;

B: Substitute teach qualifications;

C: Pupil-teacher ratio.

D: Practices and procedures commencing with the initial application of the teacher for employment to and including the execution of a teacher contract.

And for Mr. Higginbotham, we had the same matter that

we asked Mrs. McDonald to bring, plus the documents relating to the time or dates or intervals for payments to teachers including the substitute teachers, together with restructions or limitations on the payment of [209] teacher salaries prior to written contracts of employment and the salary information pertaining to teachers with a rank of MFP-3.

THE COURT: Those are documents asking for the salary information?

MR. BORNSTEIN: Yes sir.

THE COURT: All right.

MR. BORNSTEIN: If such exists.

THE COURT: I see, all right. Now, do you plan to put on any evidence, Mr. Motsinger?

MR. MOTSINGER: Your Honor, if the Court please, I would imagine that we will conduct our portion of the hearing which would be very much the same as the hearing that was heard before Your Honor, and the only witnesses we would have would be in rebuttal, which we probably could take care of on cross examination anyway. The only rebuttal witnesses we would have, if any, would be Mr. Higginbotham, Miss Breeze, and Miss McDonald, who are on Mr. Bornstein's list.

THE COURT: Now, do you propose to duplicate the evidence that was adduced at the hearing on March 17th, Mr. Bornstein?

MR. BORNSTEIN: To a large extent, Your Honor, it will be a duplication.

THE COURT: What is the reason for that? Why can't [210] this go in as evidence in this case? You have the transcript written.

MR. BORNSTEIN: For two reasons, Your Honor. One, I think I can do a better job because I have more information than I had on March 17th.

Secondly, we have offered to the defendants' counsel to attempt to stipulate because we really are not that far apart except the ultimate conclusion of facts here. I don't think there is any difference between us with regard to

what happened. I think perhaps the conclusion to be drawn from the factual situation is where we differ and to that extent we are going to try to sharpen the testimony so that the conclusion can only be one way, that Mrs. Connell would have been issued a written contract of employment if she had signed the loyalty oath.

THE COURT: Is there any dispute on that?

MR. BORNSTEIN: Mr. Motsinger disputes it, Your Honor.

MR. BUFORD: I think Mr. Bornstein is correct. I believe we are in accord on all subject matters except the failure by this plaintiff to execute the loyalty oath is the sole reason for her not being granted a contract, or stated another way, that if she had been willing to sign the loyalty oath, then she would, without further consideration, have been granted a contract and we deny [211] that this is necessarily so. Mr. Bornstein tends to prove that it is a fact that if she had signed the loyalty oath that she would have been hired. Our position will be that there are other discretionary matters which should be taken into consideration by the School Board and the other school officials before the contract can be finalized, any one which may have fallen on the way and that certainly there is no assurance that she would have been granted a contract until such time as she signed the loyalty oath - this was one of the steps that must have been taken and failing that step she would have failed to have been given employment, but this does not necessarily mean that if she had taken that step that she would have ultimately been employed.

MR. BORNSTEIN: Your Honor, it would seem to us if the defendants have some witnesses or testimony that they are going to proffer that that discretion could or would have been exercised, that if Mrs. Connell signed the loyalty oath that she still might not have received the written contract of employment, that that should be divulged at this time.

THE COURT: I think that is correct.

MR. BORNSTEIN: If they have no such testimony to offer, I think they should stipulate so that we can avoid [212] this whole three, four or five hours of taking testimony again.

THE COURT: Let's not have duplication here. Let's not have any straw men now. If you have a valid contention that she would not have been hired and that there was some other reason why, then, of course, you are entitled to present it, but let's - I think you should now disclose who the witnesses are that you are going to use to present such evidence, but if that isn't the case and the sole issue here is really one of law as to this oath, it seems to me that it would be better that we get right down to that and confine the hearing to that, if that, in fact, is what the sole issue is.

MR. BUFORD: May I suggest, Your Honor, that under the Statutes of the State of Florida, if I recall, the hiring process recommendation is made by the principal to the county, who then must recommend to the Board of Public Instruction, which is the contracting authority. Now, it would be, to me, premature to try to determine and to cast ourselves into the future to see if these recommendations are coming. Now, the Court suggested that we should -

[213] THE COURT: Yes, I understand. I had all that in the first hearing, but now you all know in consulting with your clients whether or not in fact this was or was not the sole obstacle to the employment of this plaintiff. You know and if in good faith you have evidence that there was some other basis and you wish to present it, you are entitled to do so, and we will hear it and try to decide on the basis of that, but if there isn't then, let's not, as I say, set up straw men.

MR. MOTSINGER: We are not trying to belabor the point, Your Honor. Any evidence that we have in that regard Mr. Higginbotham could testify to and as far as the documents that were presented at the first hearing, we have no objection to their being admitted at this hearing. We want to shorten the thing, Your Honor, but we don't want

to be presumptious so in that regard I would say that the only witnesses that we intend to produce would be numbers two, three, and four on Mr. Bornstein's list and Mr. Higginbotham would speak to the point of employment.

MR. BORNSTEIN: If the Court please, I would agree that we are creating straw men. We have gone through Mr. Higginbotham -

THE COURT: Don't say that you agree - I didn't say agreement. That presumes that someone else has made that conclusion [214] and I didn't make that conclusion. I said let's not do it, but I didn't say that they were.

MR. BORNSTEIN: Well, we have gone through Mr. Higginbotham's testimony without agreement and as of March 17th, the only information that Mr. Higginbotham had regarding Stella Connell and her ability as a teacher was what he heard that day for the first time, with regard to her abilities and qualifications as a teacher and he so testified, and after the hearing of March 17th, Stella Connell didn't teach any more, so it would seem to me that any testimony that Mr. Higginbotham might adduce as to the exercise of his discretion would be based on hearsay and he could not testify to it. So, if the defendants are relying on Mr. Higginbotham's testimony which would be offered on the 11th to show why, in the exercise of his discretion, he might not have recommended Mrs. Connell, we would challenge them to show that he could offer such evidence. I don't think that he could.

MR. BUFORD: May it please the Court, I would like to be heard on that.

THE COURT: Of course, we would have to wait until the time of the offer of the evidence to be able to rule on whether or not it is admissable. It might or might not be, depending on the context under which it was offered and [215] what had come on before, and I am not going to presume to decide that issue at this point.

MR. BORNSTEIN: Could we inquire, Your Honor, whether the defendant proposed to offer any testimony regarding the plaintiff's capabilities and qualifications as a teacher?

THE COURT: I think it is in order to ask that. In fact, it goes right to what we are trying to determine.

MR. MOTSINGER: Yes sir, we do intend to.

MR. BORNSTEIN: And your only witnesses in that regard will be the witnesses listed on my list?

MR. MOTSINGER: That's right.

MR. BORNSTEIN: Okay.

MR. MOTSINGER: I have been saying two, three and four, and it should be two, three, four and five - Mrs. Banks also.

THE COURT: Now, aren't these the people that testified at the hearing before me?

MR. MOTSINGER: Yes sir. Your Honor, may I ask the Court a question at this point?

THE COURT: All right.

MR. MOTSINGER: Does the Court - It appears that there is going to be a lot of rehashing of what we had at the prior hearing. Actually, as far as the testimony that was offered, we could agree to a great deal of it and just let it go into the record rather than going through [216] it all again, if Mr. Bornstein wanted to do it that way.

MR. BORNSTEIN: I could not agree to that, Your Honor. I want an opportunity to sharpen that testimony, if we cannot reach a stipulation and a conclusion.

MR. BUFORD: May I make a suggestion, Your Honor? If I may make a suggestion, not to be taken as a stipulation at this point, but merely a suggestion which might aid the Court in the proceedings in this case and not to be considered as a concession at this point, unless it is later incorporated into a stipulation that, as I view the case the question basically, one, is the question of the constitutionality of the loyalty oath of Florida - the loyalty oath as has been pointed out in all briefs contains two phrases, at least, which have been determined by the Supreme Court of the United States not to be acceptable in state loyalty oaths. Conceding for the purpose of argument, the unconstitutionality of these two phrases, I think the matter will then pend upon whether or not the loyalty oath

is itself severable and whether these two phrases may be stricken from the loyalth oath and preserve the remainder of the loyalty oath as not being offensive to the Constitution. If these phrases are determined to be unconstitutional and the loyalty oath is determined to be severable, then [217] there remains a loyalty oath but not in the form of the loyalty oath that was tendered to Miss Connell, then it would appear to me that her failure to sign the loyalty oath prior to embarking on her teaching duties would be justified and the School Board would not be justified in withholding monies which she had earned prior to this time. Then the case can proceed in either of two directions. If the Court determines that the loyalty oath in its entirety must be held to be unconstitutional and is not severable, we having argued that it is and having been determined to have been so by the Supreme Court of Florida which is conclusive as far as the Florida Statute is concerned. If the whole loyalth oath is stricken, this presents one cause of future action and presents one opportunity for the Court's determination. If the loyalty is found, however, to be partly constitutional and portions of it salvageable, then we have the further speculative question that must arise is, will Miss Connell sign the portion of the loyalty oath that is preserved by the Court. Until this determination is made by her, the Court would not be in a position, I would not think, to require that she be hired and absence her requirement that she execute any provisions of the loyalty oath that is found to be constitutional. So [218] I doubt that we are going to ultimately end up with much controversy on the back pay proposition to be quite frank.

The problem now comes as to whether the School Board shall be compelled to employ this teacher under an annual contract. The length of the contract for which they must employ her and whether or not there are any valid conditions that the School Board may impose at this time to the granting of such contract, such as the execution of the valid portion of the loyalty oath and compliance with the other rules and regulations and statutes of the state.

THE COURT: Well, of course, your statement there presumes that she would have been hired except for her refusal to take the loyalty oath and it seems to me that factually it moves on beyond that particular hurdle, which is the same position as the plaintiff takes in that you then reach a divergent position when you come to the issue of the legality of the loyalty oath.

MR. BUFORD: I think we would be willing to concede, Your Honor, as I said, that she would be hired if she signed the loyalty oath, but I didn't mean that I think that she would have been paid for the services - past services performed on a temporary substitute teacher basis, but for her failure to sign the loyalty oath - [219] I think we will agree to that and we will concede she would have been paid for the services she performed in the past and that these were performed on a temporary basis as a substitute teacher.

MR. BORNSTEIN: There is no evidence of substitute teacher and I don't know where that word keeps arising here.

MR. BUFORD: I thought there was testimony at the prior hearing that she was on a substitute teacher basis.

MR. BORNSTEIN: Temporary certificate, I think, rather than a substitute teacher.

MR. BUFORD: She performed services before any acknowledgment was received on her certificate - on her application and this is not unusual.

MR. BORNSTEIN: I think that is a question of fact between us also, and we will not concede that she was a substitute teacher at any time.

THE COURT: Well, I can see that we are going to want to present some evidence. Let's - do you want to make an opening statement?

MR. BORNSTEIN: It would be very brief, Your Honor.

THE COURT: And Mr. Motsinger, do you want to make an opening statement then for the benefit of the Court?

MR. MOTSINGER: Mr. Buford will, Your Honor.

THE COURT: For all of you?

MR. MOTSINGER: Yes, Your Honor.

[220] THE COURT: He is the intervenor and each of you are entitled if you wish.

MR. MOTSINGER: We are going to try to be as brief as possible and just let one person do that.

THE COURT: He will in effect represent all of you?

MR. MOTSINGER: Yes sir.

THE COURT: You will then make the opening statement?

MR. BUFORD: Yes sir.

THE COURT: All right. How long would you anticipate then that it would take for you to present your evidence? The same as before?

MR. BORNSTEIN: We took about three hours before, Your Honor.

THE COURT: I think so.

MR. BORNSTEIN: I would think that we might be able to do it in that time or less, because I think our questions could be sharpened at this point.

THE COURT: All right.

MR. BUFORD: I don't anticipate the presentation of our side would probably exceed an hour, Your Honor. I doubt it as far as the evidence is concerned.

THE COURT: All right. Now, do you have any exhibits or witnesses which have not been disclosed to Mr. Bornstein?

MR. MOTSINGER: No, Your Honor.

MR. BUFORD: No sir.

MR. BORNSTEIN: We included, Your Honor, besides what we [221] introduced on March 17th, together with what the defendants may bring with them under the subpoena. We have included in our list a letter from Mr. Johnson to me and we now have Mrs. Connell's temporary teacher's certificate issued by the State of Florida.

THE COURT: I noticed that on your list here: I wonder if you all could - do you suppose that you could reach a stipulation as to what the factual and legal issues are involved in this case that you could present by Friday morn-

ing? You have got the factual issues - it appears as to whether or not this teacher was on a substitute basis or whether she had been employed or would have been employed as a permanent teacher except for the taking of this oath. That is about the sum total of the factual issues, isn't that right?

MR. BUFORD: It appears to me to be so, Your Honor.

THE COURT: Then you have the legal issues, that is as to whether the oath in its entirety is unconstitutional. That really is not in issue because the defendants have conceded that in its entirety as it was first presented to the teacher, it was in, at least several portions unconstitutional. There then follows the legal issue as to whether or not the oath is severable as to its separate provisions.

Your contention, I take it Mr. Bornstein, is that [222] it is not severable.

MR. BORNSTEIN: We will make that argument, Your Honor. We will urge that position.

THE COURT: But, of course, if it were not severable, I suppose that you would concede, Mr. Buford, then that it would have to be all unconstitutional.

MR. BUFORD: If the Court determines, Your Honor, to follow the recent line of cases to continue to hold this language unconstitutional - if the Court finds these two phrases to be unconstitutional and non-severable, then the oath is out the window as being unconstitutional.

THE COURT: It does contain at the present time one found to be unconstitutional by the Supreme Court of the United States, doesn't it, as it was originally presented?

MR. BUFORD: Yes sir.

THE COURT: And the Supreme Court of Florida recognized that when they in their second Cramp decision decided that it was severable?

MR. BUFORD: Yes sir.

THE COURT: So then if it is not severable, then the whole would be presumably unconstitutional. On the other hand, if it is severable then there follows the provision by provision analysis as to the constitutionality of the

[223] various provisions, it being Mr. Bornstein's position that even if severable, each and all of the parts taken and considered separately are what - unconstitutional?

MR. BORNSTEIN: We are going to - it is a novel position, but we are going to urge it in this particular class action.

THE COURT: As I understood from your brief, your position is that one has a constitutional right to refuse to take an oath to support the Constitution.

MR. BORNSTEIN: In two parts, your Honor. The State Constitution and the Federal Constitution.

THE COURT: I see. And the position of the defendants would be that certain of these provisions are constitutional and that even if the plaintiff was justified in not taking the oath until the unconstitutional provisions were eliminated, that she should not - that an order should not be entered compelling her employment without her taking an oath as to those provisions which are constitutional.

MR. BUFORD: That's right, Your Honor.

THE COURT: Does that about state it?

MR. BORNSTEIN: I think it does, Your Honor, with one further provision which might be the testimony which would go toward an interlocatory injunction. It would be [224] the same testimony, Your Honor, but -

THE COURT: In this case, this is the final hearing so why are we going to have to have that? I am asking you for edification - why is there an issue of an interlocatory injunction here?

MR. BORNSTEIN: We take the position, Your Honor, that Mrs. Connell was or would have been employed until the end of the school year and Friday will be April 11th, and you still have about two months of the school year left. It is conceivable that the final adjudication might not be reached by the Court for a matter of some months, but we believe that the testimony could and would show that this class is still available for Mrs. Connell, if in fact a portion of the statute is already conceded to be unconstitutional, that she could be reinstated for the balance of the school year awaiting the final opinion of the Court.

THE COURT: I see. All right. Are there any other points that you think ought to be taken up at this time, Mr. Buford, or Mr. Johnson, or Mr. Motsinger?

MR. BORNSTEIN: Your Honor, I am not as familiar with the federal procedures as I should be; will it be necessary to file some pleadings with regard to our request for an interlocatory injunction? Now, both of us, both the defendants and plaintiffs have included it in their [225] briefs, but there is no motion as such.

THE COURT: Did you ask for it?

MR. BORNSTEIN: It is in the complaint, Your Honor.

THE COURT: I think that is sufficient.

MR. MOTSINGER: Your Honor, I think the Court has pretty well stated the issues of fact and the issues of law. Does the Court wish us to enter this in written form?

THE COURT: No I don't think it will be necessary since we have it here on the record and we have gone over it. It will save you all that extra work.

How about you, Mr. Bornstein?

MR. BORNSTEIN: I think you stated it very succinctly and I have no dispute with the issue in dispute. You put your finger right on the area of the agreements and disagreements.

MR. MOTSINGER: Will the hearing be in the courtroom, Your Honor.

THE COURT: Yes, it will be here in this courtroom.

MR. MOTSINGER: Here in Orlando?

THE COURT: Yes, the judges will be coming here.

(Discussion off record.)

. . . Thereupon, the pre-trial conference was concluded at 9:45 o'clock A. M.

[Subscription omitted in printing]

[Caption omitted in printing]

* * *

TRANSCRIPT OF TESTIMONY

[Hearing on the Merits]

Testimony taken on April 11, 1969, commencing at 9:30 o'clock A. M., at the Three Judge Court Hearing in this cause held before the HONORABLE BRYAN SIMPSON, United States Circuit Judge, and District Judges, the HONORABLE GEORGE C. YOUNG and the HONORABLE CHARLES R. SCOTT, at Orlando, Florida.

APPEARANCES:

JEROME BORNSTEIN, ESQUIRE
125 S. Court Avenue
Orlando, Florida

Appearing on behalf of the Plaintiff.

JOHN MOTSINGER, JR., ESQUIRE
GEORGE JOHNSON, III, ESQUIRE
100 East Robinson Avenue
Orlando, Florida

RIVERS BUFORD, JR., ESQUIRE
1124 Alachua Street
Tallahassee, Florida

Appearing on behalf of the Defendants.

* * *

[247] PAULINE McDONALD
having been produced and first duly sworn as a witness herein, testified as follows:

DIRECT EXAMINATION

BY MR. BORNSTEIN:

Q. Would your state your name, please? A. Pauline McDonald.

Q. Where do you live, Miss McDonald? A. 847 Highland Avenue - I just moved.

Q. That is here in Orlando, Florida? A. Right, Orlando.

Q. And you are here pursuant to a subpoena duces tecum served upon you by the plaintiff in this cause? A. Right.

Q. Are you presently employed, Miss McDonald? A. Yes.

Q. Would you state what your present position is? A. Co-ordinator of Instructional Personnel, Orange County Schools.

Q. Does that make you head of the Personnel Department of Orange County for the School Board? A. Yes.

Q. Would it be - putting it in layman's terms, are you Personnel Director, so to speak? [248] A. So to speak.

Q. How long have you held that position? A. I believe it is three years.

Q. Were you employed by the Orange County Board of Public Instruction before that time? A. Yes, sir, I was.

Q. In what capacity? A. As Co-ordinator, as Elementary Supervisor, and as Principal.

Q. Have you been a principal of a school? A. Right. Also teacher.

Q. You have had experience in almost every aspect of the administration in the school system? A. Yes.

Q. Would you state for the Court what your present duties and responsibilities are as Co-ordinator of Personnel? A. To interview teachers, prospective teachers. To keep records. We receive the applications from the teachers, we process them, and we also send the prospective teachers out to the schools. We keep folders on each teacher and the records.

Q. When a person comes into you, seeking employment as a teacher in Orange County, do you make a preliminary determination as to whether or not they are qualified and eligible for employment in such a position? A. When they first come in, no, I do not do that. When they [249] come in for an interview then they give us their applications and we have to process them.

Q. Don't you ask them how much education they have? A. Yes, I ask them that.

Q. If a high school graduate came in to see you, you would tell that person: "You are not qualified for employment as a teacher." A. Right.

Q. So, to a certain extent you do some screening of the applicants? A. Right.

Q. Do you also on these interviews advise the candidate for employment what rank and what salary he or she might expect if employed? A. If they ask, yes. We give each teacher that comes in a salary schedule.

Q. Each applicant? A. Each applicant.

Q. Do you tell them what their rank or grade would be based on their educational background and experience? A. If I had evidence that they had the degree and all, then - we couldn't give them their exact salaries because we have to verify the experience.

Q. I am just stating, if a person told you "I have a Masters Degree from the University of Florida", would you not [250] probably tell them "If you have a Master's Degree and if it is verified, you would be Rank Two, or Rank One, whatever the case might be? A. Yes.

Q. Do you do the interviewing or undertake any duties or responsibilities with regard to substitute teachers? A. Yes, sir, we also give out the applications to substitute teachers.

Q. And you interview applicants for persons who are interested in obtaining employment as a substitute teacher? A. Yes.

Q. When they come in, you give them the papers for certification? A. Yes.

Q. And initially they come to you and that comes under the responsibility of your office? A. Right.

Q. Is there a difference in qualifications between a substitute teacher and a teacher who is other than a substitute teacher? A. There is a difference, yes, in the type of certificate they might receive.

Q. Normally, it takes less qualifications to be a substitute teacher than to be a regular teacher, does it not? A. We do have substitutes that have -

[251] Q. I grant you, but if a person does not have a college degree they are limited to being a substitute teacher? A. Yes, they may get a certificate - this is what we ask the substitutes to do.

Q. Let me repeat my question. If a person does not have a degree, a four year degree, from a qualified college, or university, are they not limited to a certificate as a substitute teacher? A. No, because part time people might get part time employment and might get a certificate without a degree.

MR. BUFORD: May it please the Court, I respectfully object to this line of questioning inasmuch as certification of teacher's qualifications are covered by the Statutes of the State of Florida, the Rules and Regulations adopted pursuant thereto by the State Department of Education. These Regulations and Statutes are the best evidence as to the requisite qualifications for various types of teachers.

JUDGE SIMPSON: I am sure that is true, Mr. Buford, but it may be that there is some question of practical application that counsel is getting to and whatever it is, if it is a question of what the law is, let's not get the law from this lady, I want the law from you gentlemen.

MR. BORNSTEIN: This is not a question of law, Your Honor. [252] This I think is a question of what this lady does and says.

JUDGE SIMPSON: Let's get on to it. There can't be much dispute about this, is there?

BY MR. BORNSTEIN:

Q. Miss McDonald, if somebody comes to you who does not have a college degree, would you not advise that person that he or she can teach only as a substitute teacher in Orange County? A. No.

Q. Under what circumstances would you -

JUDGE SIMPSON: What would you advise? Please let's get on with this.

THE WITNESS: If it is a part time person, they do not have to have a degree.

BY MR. BORNSTEIN:

Q. How about a full time person who comes to you and says, "I want a full time job as a teacher but do not have a college degree." A. I think I would have to refer back to these -

Q. Would you tell them "You cannot get a teacher's certificate for full time employment because you do not have a college degree." A. No sir, I wouldn't tell them that.

Q. What would you tell them? [253] A. That they would be able to get a substitute certificate or part time.

Q. I am not talking about part time - I am talking about full time. If a person comes to your office - A. It has been the policy of the Board that we do not employ a teacher less than Rank Three - that is a Bachelor's Degree.

Q. Miss McDonald, I am talking about you, and not about the Board. If I come to your office as a Personnel Director and I say "Miss McDonald, I want a full time teaching position in the Orange County School System, but I am not a graduate." What would you tell me? A. I would probably tell them that they could probably substitute.

Q. Thank you. Is there a salary differential between substitute teachers and regular teachers? A. Yes.

Q. Could you state to the Court what a substitute teacher can get and what a regular teacher can get? A. A substitute teacher, with two years of college - the salary is $12.00 a day. If they have a valid certificate of Rank Three, the salary is $22.00 a day. If they have a Rank Two, substitute teaching certificate, it is $27.00.

JUDGE SIMPSON: Rank Two would be the Master's Degree?

THE WITNESS: Master's Degree and Rank One is Doctor.

[254] BY MR. BORNSTEIN:

Q. Is part of your responsibility, Miss McDonald, to keep records on teacher vacancy positions in the school system? A. Yes sir.

Q. And does it occur from time to time that teacher vacancies may arise during the course of the year because of a shift in students or what-have-you or the teacher gets sick and leaves? A. Yes.

Q. This vacancy list that your office keeps, is that a list for regular certified teachers or is this a list that includes substitute teachers? A. Certified teachers.

Q. Only certified teachers, is that correct? A. Yes.

Q. Did you bring with you in accordance with the subpoena duces tecum your vacancy list for the month of January, 1969 to February 10, '69? A. I did.

Q. To refresh your memory, starting with the earliest list in January, 1969, could you give me the date of the first list that you have? A. I listed this from January 1st through February 10.

Q. All right. On January 1, did a vacancy appear on your list for Callahan Elementary School? [255] A. I am not sure that it was January 1 or what date - I thought this was the way this material should be given to you.

Q. During the month - A. There was a fourth grade position open during this particular time. I did note the dates beside this (indicates).

Q. Sometime during the month of January on your teacher vacancy list appears a vacancy for the fourth grade teacher at Callahan Elementary School in Orlando, is that correct? A. Yes.

Q. When you refer to the list in February, does that vacancy still appear? A. I have it right here - from January 1st to February 10th.

Q. You have it? A. Yes, and this is the way the list is made.

Q. How did you work in your office - do you keep a daily list? A. I worked this as I thought you asked for it.

Q. You didn't bring the original list with you, did you? A. I brought the list, copied from the Minutes, but I copied all of these from the 1st through the 10th.

Q. Let me ask you this. You keep a list of teacher vacancies? A. Right.

Q. As those vacancies are filled, you make some notation on your list? A. Yes, we do.

[256] Q. Do you have those original lists with you? A. No, I do not.

Q. You did not bring them with you. Did you make any notations on the original lists that you did bring with you that the Callahan vacancy had been filled? A. Yes, we always make a note on the original list.

JUDGE SIMPSON: Well, did you make one in this instance?

THE WITNESS: Yes.

JUDGE SIMPSON: At the Callahan vacancy, somewhere around February 10, did you make a notation at that time that it had been filled?

THE WITNESS: Right. We had a substitute.

BY MR. BORNSTEIN:

Q. Miss McDonald, would you have sent a substitute teacher to Callahan Elementary School? You already said you do not concern yourself with substitute teachers on your vacancy list - that those are the regular teachers. Would you have sent a substitute to Callahan Elementary to fill that vacancy? A. If they have a Rank Three. This was a regular mission - Mrs. Connell was sent there -

JUDGE SIMPSON: Don't drop your voice, please. It is hard to hear you. Don't be nervous about these proceedings. Just do the best you can.

BY MR. BORNSTEIN:

[257] Q. Did you personally interview Miss Connell? A. Yes, I did.

Q. Was there any discussion that you recall between you and Mrs. Connell with regard to her being a substitute teacher? A. I do not recall.

Q. Was it ever mentioned between you and Mrs. Connell that she would qualify only as a substitute teacher or would work at the substitute pay scale that you testified to? A. I do not recall about that, no.

Q. Is it customary for a person who qualifies for Rank Three and who wants full time employment to accept a position as substitute teacher where a full time teacher position is available - is it customary? A. I'd say that we have had it happen.

Q. Occasionally? A. Yes.

Q. If there is a full time teacher position available and qualifies for full time teaching position they would not take a substitute position, would they? A. No.

Q. All right. Let's go on. Miss McDonald, do you recall at the time that you interviewed Mrs. Connell - did you interview her on one or more than one occasion? A. She came in one time early in January, then came in twice or three times - I talked to her and then she came back to [258] fill out the papers.

Q. You did furnish her with potential teacher vacancy positions, did you not? A. Yes.

Q. Among those that you gave her was Callahan Elementary School listed? A. Right.

Q. All right. Do you remember any one of these one or more interviews - did you advise Mrs. Connell that she would be required to sign the Florida Loyalty Oath as a condition of employment? A. No.

Q. Now, is your office responsible for the execution of the Florida Loyalty Oath? A. This is where they are handed in.

Q. Is this also where they are given to the prospective teaching candidates? A. Right.

Q. Now, do you recall when your office first gave Mrs. Connell a Loyalty Oath to sign? A. I do not recall the exact date.

Q. It was after she began teaching there, was it not? A. Yes.

JUDGE SIMPSON: Is that date in dispute?

MR. BORNSTEIN: No, Your Honor.

[259] JUDGE SIMPSON: What is that date?

MR. BORNSTEIN: Approximately February 7.

JUDGE SIMPSON: I thought it was admitted in the pleadings, wasn't it? Wasn't it established at the prior hearing that it was about February 7th - it was a week or ten days later that the revised oath was -

MR. BUFORD: The application papers were placed in the first hearing on this matter.

JUDGE SIMPSON: Whatever you can agree to, let's agree to it and let's not take the testimony.

BY MR. BORNSTEIN:

Q. Miss McDonald, let me hand you a copy of Plaintiff's Exhibit No. 6 which was introduced into evidence at the previous hearing. Was that the Loyalty Oath given to Mrs. Connell for execution on or about February 7th? A. I would have to see.

Q. Is this the first one that was handed to her? A. Yes, this is the first one.

Q. Now, was this the Loyalty Oath that all teachers and other employees of the School Board of Orange County, Florida, had been signing prior to that date? A. Right, yes.

Q. Now, was everybody required to sign that oath? A. All teachers.

Q. Substitute teachers also? [260] A. Substitute teachers.

Q. How about maintenance personnel? A. I cannot tell you about that. I am Co-ordinator of Teacher Personnel and not maintenance.

Q. Are these executed Loyalty Oaths then retained in the teacher's personnel file in your office? A. Yes, they are.

MR. BORNSTEIN: If the Court please, we would like to offer this in evidence. Shall we use the same number that we had before, Your Honor?

JUDGE SIMPSON: Could we have a blanket stipulation that all exhibits that came in before in the record are now in the record without re-identifying them and re-offering them. Could you tell me how many?

THE CLERK: One through eight, with the exception of No. 3, which was not admitted.

JUDGE SIMPSON: One through eight, and No. 3 for identification. They are put in by stipulation.

BY MR. BORNSTEIN:

Q. Did Mrs. Connell sign this Loyalty Oath - Plaintiff's Exhibit No. 6 at the prior hearing? To your knowledge? A. No.

Q. Did you request that she sign it? A. I did not give Mrs. Connell these.

Q. Did someone from your office request that it be signed? [261] A. Yes.

Q. Was the second Loyalty Oath furnished to your knowledge to Mrs. Connell? A. Yes.

Q. That second Loyalty Oath would be Plaintiff's Exhibit No. 7, at the prior hearing. I hand it to you to refresh your memory. A. Yes, this was the second oath.

Q. So, following approximately February 7, 1969, has your office been using the second form of Loyalty Oath? A. Yes.

Q. Have you given back to all the teachers their signed oaths and had them re-execute a new oath? A. No.

Q. Then, the personnel files at the present time contain all of the oaths, the old oaths except those that have been signed since February 7th? A. Right.

Q. After you had sent Mrs. Connell out to interview the various principals, were you advised by any principal that she had been selected for a teaching position at that school? A. One school was willing to have Mrs. Connell come on their faculty.

Q. Which school was that, please, ma'am? [262] A. Callahan.

Q. And is there a special form that is filled out to advise you of this? A. That is the form you have right there. (indicates)

Q. Plaintiff's Exhibit No. 2 at the prior hearing? A. Yes.

Q. Mrs. Banks completes this form and sends it in to you? A. That is right.

Q. And this form is headed "Nomination for Employment of Teacher"? A. Right.

Q. Dated January 28, 1969. Had Mrs. Banks called you before that?

JUDGE SIMPSON: January 28th?

MR. BORNSTEIN: January 28th, Your Honor.

BY MR. BORNSTEIN:

Q. Had Mrs. Banks called you before January 28th and advised you that she had selected Mrs. Connell? A. No, it is not necessary. Mrs. Banks would just send this to the personnel office (incidates).

Q. Who is authorized to put the teachers to work in the class rooms; how was that done? Would you describe the procedure that was followed? A. They are on a trial basis. I don't know that that is the word. She is put to work and knows that she is not [263] actually employed until it is approved by the School Board.

Q. Who puts her to work?

JUDGE SIMPSON: Don't testify to what somebody knows. You can certainly testify as to what you told somebody or what is customary to advise them.

BY MR. BORNSTEIN:

Q. Did Mrs. Banks call you and ask you whether she could put Mrs. Connell to work? A. No.

Q. Are you sure of that? A. I do not recall that she did. Principals do not call in.

Q. Customarily?

JUDGE SCOTT: Let her finish. Is there anything further?

THE WITNESS: I think that is all.
JUDGE SCOTT: Go ahead.

BY MR. BORNSTEIN:

Q. Customarily can a principal put to work one of the teacher applicants you sent to them for an interview? A. Yes.

Q. They can do that without confirming it back with your office? A. Right, but they notify the person that this must be approved by the Board.

Q. Did you tell Mrs. Connell at the time that she talked to [264] you that she is not employed by the Orange County Board of Public Instruction until she is approved by the Board? A. I doubt it.

Q. Now, in accordance with the usual custom and procedure, when you would get this nominating form from a principal at this point you would take that position off the vacancy list, would you not? A. After they have been approved by the Board - we cannot take them off until - if we have sent someone out -

Q. Let me rephrase my question.

JUDGE SIMPSON: I think that she is about to finish an answer. Are you through?

THE WITNESS: When we send someone out to the school, we make a note on the list that a teacher has been sent out there to this school.

BY MR. BORNSTEIN:

Q. All right. When you get this form back from a principal, the nomination form appointment of the teacher, do you continue to send the applicant out to that school to fill that vacancy? A. No.

Q. So, let me repeat it again, so the procedure then is that when this form comes back to your office from the principal of a school, at that point you take that position off your vacancy list, do you not? [265] A. We put the person's name beside this and we do not declare this position filled until approval comes back from the School Board.

JUDGE SIMPSON: You make a notation on the vacancy list to that effect and put the person's name there, right?

THE WITNESS: That is what I do, yes.

BY MR. BORNSTEIN:

Q. You don't send any more applicants out to that principal for that position, do you? A. Not after this comes in.

Q. To your knowledge, Miss McDonald, did Mrs. Connell ever sign the second Loyalty Oath? A. Not to my knowledge. We do not have it in the office. Q. Is that the reason she is not teaching today, as far as you know, because of her refusal to sign either Loyalty Oath? A. I cannot answer that question. I am sorry.

Q. Do you know of any other reason why Mrs. Connell is not teaching other than her refusal to execute this Loyalty Oath? A. I have not observed the classroom, I cannot answer that question.

JUDGE SIMPSON: You can tell if you know of any other reason. If you don't know, you don't know of any other reason except the failure to sign the Loyalty Oath? [266] There may be some other reasons that someone else may have raised - other reasons, but not to your knowledge is all that he is asking.

THE WITNESS: Uh-huh.

BY MR. BORNSTEIN:

Q. In your experience as Personnel Co-ordinator, Miss McDonald, is it customary that following your screening of an applicant for employment and following their nomination for appointment by a principal as a teacher that this is not subsequently approved by the Board of Public Instruction with a written contract following -

THE WITNESS: Would you rephrase that, please?

MR. BORNSTEIN: Read it back, please.

(Last question read back by court reporter.)

MR. BUFORD: May it please the Court, I would object to that question as being irrelevant and immaterial, in-

asmuch as we are not here concerned with what is customarily done, but concerned principally with what occurred in this particular case.

JUDGE SIMPSON: Objection overruled.

BY MR. BORNSTEIN:

Q. Answer the question, please. A. I guess I forgot the question again.

Q. Would you like the question read back again, Miss McDonald? A. Yes.

[267] (Last question re-read by court reporter.)

THE WITNESS: If the Board approves a teacher in this nomination, then we do not follow with a contract until the teacher produces a Florida Teaching Certificate. This is the law.

BY MR. BORNSTEIN:

Q. All right. Now, taking it one step further - the Florida Teaching Certificate is now handed to you. Is the contract customarily issued at that point? A. If all the experience of the teacher has been verified and approved, then a contract could be written.

Q. Now, does your file in the personnel office - would that be the proper place to find any criticism or adverse comments with regard to a teacher's qualifications and abilities? A. The teacher's evaluation is not kept in the personnel folder in our office.

Q. Where would they be kept? A. With the instructional personnel.

JUDGE SIMPSON: With what?

THE WITNESS: With the instructional personnel - if you are talking about the teacher evaluation forms that the principal -

MR. BORNSTEIN: We have no further questions, Your Honor.

MR. BUFORD: No questions, Your Honor.

[268] JUDGE SIMPSON: You may step down.

(Witness excused.)

ESTELLE BANKS,

having been produced and first duly sworn as a witness herein, testified as follows:

DIRECT EXAMINATION

BY MR. BORNSTEIN:

Q. Would you state your name, please? A. Estelle G. Banks.

Q. Where do you live, Mrs. Banks? A. 4001 Columbia Street, West.

Q. That is here in Orlando? A. Yes, it is.

Q. Are you here pursuant to a subpoena duces tecum which was served upon you by the plaintiff in this case? A. Yes.

Q. Are you presently employed? A. Yes.

Q. What position do you presently hold? A. Principal of the Callahan School.

Q. How long have you been employed as a Principal at Callahan School? A. Ten years.

Q. Your experience as a principal–

JUDGE SIMPSON: That is an elementary school?

[269] THE WITNESS: Yes sir.

JUDGE SIMPSON: Out on the west side?

THE WITNESS: Yes.

BY MR. BORNSTEIN:

Q. In your experience as a principal - does it sometimes happen that there will be a teacher vacancy during the course of the year? A. There is a possibility.

Q. If a teacher gets sick or leaves town, then that position would have to be filled by another teacher, is that correct? A. Yes, that could happen.

Q. Can that position be filled by a person without a college degree who is not a certificated teacher? A. It could be provided we find nobody who is properly certificated.

Q. If you have people who are properly certificated, then it is filled by a properly certificated teacher? A. Yes.

Q. During the school year, did a vacancy occur at Callahan Elementary School? A. I would say yes and no. I would say no from the standpoint that we had an overcrowded condition there and a grade - the fourth grade to be specific, and without my knowledge the School Board saw fit to give us an extra teacher for [270] the fourth grade.

Q. The School Board told you as a principal then that you had a teacher vacancy whether you knew it or not? A. Right.

Q. Approximately when was this, Mrs. Banks? A. It was, to be exact, around the 20th of January.

Q. Of 1969? A. 1969.

Q. At that point were prospective applicants for that vacancy sent to you for interviews? A. Several.

Q. Did you interview them? A. I did.

Q. Among those applicants for that position, did Mrs. Connell come to Callahan? A. She did.

Q. Did you interview her? A. I did.

Q. Did you nominate her for appointment as a teacher to fill that vacancy? A. I did.

Q. I hand you Exhibit No. 2 from the previous hearing and ask is that your signature? A. That is my signature.

Q. All right. Did Mrs. Connell start teaching at Callahan? [271] A. Yes, January 27th.

Q. Did you get authorization or instructions from anyone that Mrs. Connell could begin teaching? A. Well, since there was an opening I was permitted to place her in that room, but since we have divided the pupils, however.

Q. Did you talk to Miss McDonald with regard to authorization to start Mrs. Connell on the job? A. I did, but with the proviso that the School Board -

JUDGE SIMPSON: He just asked if you talked with her. You talked with her about this matter?

THE WITNESS: Yes.

BY MR. BORNSTEIN:

Q. Did you ask Miss McDonald if you could start Mrs. Connell teaching? A. Yess - well, I wouldn't say any more I may say too much.

Q. Did Miss McDonald say that it was okay to start Mrs. Connell on January 27th A. Yes.

Q. Did you at the time that you interviewed Mrs. Connell tell her that she might have to sign a Florida Loyalty Oath? A. Not at that time but at a later time.

Q. Did you at the time of selecting her to teach, did you tell her that "You are going to be employed as soon as the School Board gets around to issuing you a written contract." [272] A. I never tell a teacher that. I always say to the teacher -

JUDGE SIMPSON: Specifically, you didn't tell this one that - that is the question.

THE WITNESS: No.

BY MR. BORNSTEIN:

Q. Was it your understanding that this teacher's vacancy - this additional fourth grade section was to continue for the balance of the school year? A. I took for granted that it would.

Q. And were you interested in your selection of an applicant to find out whether or not, if that person was selected by you, that he or she would stay with the class for the rest of the year? A. That must be yes or no?

Q. You may answer yes or no and explain if you want to. A. Yes, providing everything worked out equally.

Q. You were not interested in getting a person who was just going to be with you just for a week or ten days? A. No, but those things happen.

Q. Did you not make an effort to determine in your selection that it wouldn't happen and if at all possible to keep it from happening? In other words, did you ask Mrs. Connell "If I select you and everything is all right, you are going to be with me for the rest of the school year." A. No, I didn't ask her that question.

[273] Q. Something in that substance - did you ask would she be here in Orlando for the balance of the school year and teach, if everything went all right. A. I guess I took it for granted, but I didn't ask her that question.

Q. What did you ask her when you interviewed her? A. The usual things you ask a teacher, her qualifications, has she worked, her schooling, and where she attended school and if she loved children, and was willing to work with black children.

Q. Did you ask how long she had lived in Orlando? A. No, I didn't.

Q. Did you ask her if she intended to remain in Orlando at least until June? A. No, I didn't ask her that.

Q. You didn't ask her that.

JUDGE SIMPSON: Callahan School is predominantly or entirely Negro?

THE WITNESS: It is entirely Negro.

BY MR. BORNSTEIN:

Q. At the time you selected Mrs. Connell, was she to be the only white teacher in the school? A. As a full time teacher. I have a substitute who comes in.

Q. Can a substitute teach, Mrs. Banks - according to your experience as a teacher, can a substitute teach continously [274] in a classroom say for one, two or three months? A. We don't have it like that.

Q. If you have a position that is going to be continuous for a couple of months, because a teacher left town or a teacher is sick or a new class is created, that would not be filled by a substitute, would it? A. Could I answer that in this manner? We just completed a similar situation.

Q. You are a principal. Customarily, how is that vacancy filled by a substitute or a regular teacher? A. If we know for sure, then we fill it with a regular teacher, but there are some situations that prevent you from doing that.

Q. How long did Mrs. Connell teach at Callahan Elementary School? A. I don't know. I have a secretary that keeps that record. She started on the 27th of January.

Q. Was she teaching after the court hearing on March 17th? A. No.

Q. After that time she no longer taught, is that correct? A. That's right.

JUDGE SIMPSON: That is agreed, I think.

MR. BORNSTEIN: Yes, it is, Your Honor.

JUDGE SIMPSON: In the briefs, as I read them she no longer taught on March 18th, after the court hearing.

[275] MR. BORNSTEIN: Yes, Your Honor.

BY MR. BORNSTEIN:

Q. Do you still have four fourth grades? A. Yes.

Q. Who started teaching that section on March 18th? A. I placed a sub in the classroom for a few days, and after the end of those few days I still have a sub in there.

Q. The same sub? A. No.

Q. In other words, Mrs. Connell's position has not been filled to this time by a qualified teacher? A. Well, no, the teacher is qualified but she is subbing now.

Q. It has been filled by a substitute teacher from March 18th until today? A. Right.

Q. There is a substitute teacher in there today? A. Right.

MR. BORNSTEIN: We have no further questions, Your Honor.

CROSS EXAMINATION

BY MR. BUFORD:

Q. Mrs. Banks, when you interviewed Mrs. Connell, did you say you had a general discussion with her relevant to her qualifications as a teacher? A. Yes sir.

Q. Was the question of holding a teaching certificate issued [276] by the State of Florida brought up in your discussion? A. No, because I took for granted that that would be handled by the County office.

Q. Did you and she discuss whether or not she in fact had a teacher's certificate? A. I don't believe, to tell the

truth - I don't - I may have, I will take that back. I may have asked and her reply to me was that she had applied for one, I think.

Q. She was not then a holder of a certificate at the time she applied for the position? A. She applied for one, I think that is the way it was.

Q. In response to one of Mr. Bornstein's questions as to whether you gave her assurance that she would receive a permanent teaching position, you made an answer relative to what you customarily do in these cases when talking to a teacher. Would you tell me what did you give her as such assurance? A. I never give a teacher assurance as long as I have been working, that you will have this job. My statement to a teacher is that I will do the best I can for you to help you and providing everything works out equally - at the same time, I may be doubly sure that this will go through but I never expose that information to the teacher.

Q. What do you mean provided everything worked out equally? A. So far as the School Board following through on my suggestion [277]

[277] Q. Are you familiar with any requirement that the School Board accept your nominations?

MR. BORNSTEIN: I object, Your Honor.

MR. BUFORD: Withdraw the question.

BY MR. BUFORD:

Q. I believe you started to testify on direct examination with reference to a similar situation to this one existing at your school recently. Would you tell us what that situation is, please, ma'am?

MR. BORNSTEIN: I object to that also as irrelevant and immaterial. We are not concerned with similar situations, Your Honor.

MR. BUFORD: May it please the Court, this was the reason for my objection a moment ago, but Mr. Bornstein felt it relevant as to similar situations than customary procedures.

JUDGE SIMPSON: Objection overruled. Did you have some further grounds to state before I rule?

MR. BORNSTEIN: My only comment, Your Honor, was the questions I asked concerned custom and practices and not specifically other instances and to that extent I think specific instances I think are irrelevant and immaterial.

JUDGE SIMPSON: This other instance may or may not have been the origination of a custom or may have been the continuation of one. I don't know. We will take the [278] answer anyway.

THE WITNESS: Your question again, please?

BY MR. BUFORD:

Q. You mentioned a similar situation to Mrs. Connell's situation, I believe, if I understood your partial answer correctly, that recently occurred. Would you tell the Court what that situation is? A. The situation is or was that I had a teacher who had a heart attack on January 1st. Naturally, she failed to return to school on the 6th of January. We attempted to get a sick leave for the rest of the year through her doctor, but her doctor advised her not to get the sick leave and to just remain absent through that period and he said that she would return about the first week in April, and he kept us posted. During that period of time we had a substitute teacher in the classroom and the teacher who had this heart attack returned to school on the first day of April.

MR. BUFORD: No further cross examination, Your Honor.

* * *

[279] GEORGE JOHNSON, III,

having been produced and first duly sworn as a witness herein, testified as follows:

DIRECT EXAMINATION

BY MR. BORNSTEIN:

Q. Would you state your name? A. George W. Johnson, III.

Q. Where do you live, Mr. Johnson? A. 871 Bonita Drive, Winter Park, Florida.

Q. Are you here pursuant to a subpoena served upon you by the plaintiff? A. Yes sir, I am.

Q. What is your occupation? A. I am an attorney.

Q. With what law firm to practice law? A. With the firm of Johnson, Motsinger, Truman and Sharp.

Q. That is a firm of attorneys that represents the defendant School Board and Mr. Higginbotham, is it not? A. That is correct.

Q. Does the Johnson firm represent the School Board generally? A. In general matters, yes.

[280] Q. In other words the Johnson firm is the School Board attorney for Orange County, is it not? A. That's correct.

Q. Are you an associate in the Johnson firm? A. That's correct.

Q. As an associate in the Johnson firm you worked on legal matters as part of your duties? A. Yes.

Q. On or about February 14, 1969, did you write to me with regard to this particular case and the oath in this case, and I hand you your letter of February 14, 1969. A. Yes, that is the letter that I wrote to you.

JUDGE SIMPSON: What exhibit is that?

MR. BORNSTEIN: This has not been introduced before, Your Honor. Counsel, do you have any objection to offering this in evidence?

MR. BUFORD: May it please the Court we submit is irrelevant to the issues in this case. It is written by an attorney to an attorney and there is no showing that this attorney has any authority to bind his client by the terms of this letter, if there be any terms. I fail to see the relevancy of it and, therefore, object.

THE CLERK: Plaintiff's Exhibit No. 9 for identification.

(Thereupon, the document last above referred to was received and Marked as Plaintiff's Exhibit No. 9 for identification.)

[281] JUDGE SIMPSON: Objection overruled. Exhibit No. 9 is received.

(Thereupon, the document last above referred to was received and marked in evidence as Plaintiff's Exhibit No. 9.)

JUDGE SIMPSON: You gentlemen are familiar with this. I mean you don't need to examine the exhibit?

MR. BUFORD: We are familiar with it, Your Honor. Thank you.

JUDGE SIMPSON: All right.

BY MR. BORNSTEIN:

Q. Prior to writing that letter of February 14th, Exhibit No. 9, Mr. Johnson, did you advise Mr. Higginbotham or members of the School Board that the form of loyalty oath that they had been using up to that time was unconstitutional?

MR. BUFORD: May it please the Court, I must object now to any question concerning advice given by this attorney to his client as being most confidential in nature and I object to it.

MR. BORNSTEIN: I understand, Your Honor, that we have the Sunshine Law.

JUDGE SIMPSON: We do have the Sunshine Law. I don't think it destroys the confidential client relationship and I have some doubt about it, but I will be glad to hear it.

MR. BORNSTEIN: In Orange County, the usual comment is that even the lawyers who represent an official governmental agency cannot meet secretly with their client, but are [282] open to public meetings.

JUDGE SIMPSON: Let me consult my colleagues a minute.

Objection sustained.

BY MR. BORNSTEIN:

Q. Mr. Johnson, enclosed with your letter admitted into evidence as Exhibit No. 9, did you enclose the loyalty oath which was admitted as Exhibit No. 7 at the prior hearing? A. I don't know that this is the enclosure.

Q. Is it a copy of the enclosure? A. I believe it is a copy. The one I sent didn't have the notary stamp.

Q. But the contents and the body would be the same? A. Yes.

Q. Were you authorized to prepare this new oath by Mr. Higginbotham or by the Board of Instruction of Orange County—did somebody tell you to do it? A. No, I think—

MR. BUFORD: May it please the Court. Again, counsel is inquiring as to a relationship between an attorney and a client—specifically, Mr. Higginbotham or the School Board and we feel that this line of questioning is entirely improper and therefore objectionable as being privileged.

MR. BORNSTEIN: Your Honor, we are not—

JUDGE SIMPSON: Objection overruled. You can say whether or [283] not you were instructed to draw this or decided that you should draw it or how it came about. What actually occurred is that the part that was found objectionable in the print was deleted from the former oath and the rest of it was copied over out of the statute, is it not?

THE WITNESS: That is correct, Your Honor. I was not instructed to prepare a new oath.

JUDGE SIMPSON: But you did it as part of your continued attorney relationship with the Board?

THE WITNESS: Actually, Mr. Bornstein requested information as to whether an oath would be required, and I think I submitted what oath would properly be required under the law of Florida in response.

MR. BORNSTEIN: No further questions.

JUDGE SIMPSON: You attempted to comply with what the Supreme Court said in print after it came back in print from the Supreme Court of the United States?

THE WITNESS: That's correct.

MR. BORNSTEIN: No further questions.

MR. BUFORD: No questions.

JUDGE SIMPSON: Come down, Mr. Johnson.

(Witness excused.)

EVELYN LOUISE COX BREEZE,

having been produced and first duly sworn as a witness herein, [284] testified as follows:

DIRECT EXAMINATION

BY MR. BORNSTEIN:

Q. Would you state your name, please? A. Evelyn Louise Cox Breeze.

Q. Where do you live, Mrs. Breeze? A. 250 West Reading Way, Winter Park.

Q. Are you appearing here today pursuant to a subpoena served upon you by the plaintiff in this cause? A. I am.

Q. Do you presently hold an official position with the Orange County Board of Public Instruction? A. I do not. I am employed by the citizens of Orange County.

Q. Would you state what your employment is? A. I am Chairman of the Orange County School Board.

Q. How long have you served in that capacity? A. Since the 7th day of January.

Q. Of this year? A. Yes.

Q. Have you been a member of the Orange County Board of Public Instruction prior to that time? A. Since January of '67.

Q. In other words, you have served either as a member or as a chairman for a little over two years at this point? A. That is correct.

[285] Q. And could you describe the process of employing a teacher, by that I mean a regular teacher in the Orange County School System where the teacher is being employed for the first time during the course of the school year. A. Since my tenure as a chairman or—

Q. In your experience as a member of the School Board or chairman, what procedures are followed? A. Prior to January of this year when the school trustees were removed by virtue of consitutional revision, nominations for appointment as an instructional employee of the Orange County School Board were reviewed and recommendations made to the School Board by the Board of Trustees. Since that time two members of the Board and myself, serving as a personnel committee, review these applications and nominations from principals and recommend to the entire Board

for employment as an instructional employee of the Orange County School Board.

Q. Under either system—either before January 7 or since the ultimate final determination which issued the written contract of employment, it was the School Board's decision, was it not? A. Yes.

Q. Is it customary, or does it frequently happen that a teacher will begin teaching before the School Board made its final determination? A. I believe it is customary and does happen.

[286] Q. In your experience, are these particular situations where a teacher begins teaching acted upon by the School Board at its next regular meeting? A. I have no way of determining that, Mr. Bornstein, until the application comes to the Personnel Committee with the recommendation of the superintendent. I have no knowledge of where vacancies exist and whether people have been sent to fill them or whether someone has been nominated for that position.

Q. Well, you are presently on the Personnel Committee on the School Board? A. I am.

Q. Do you have any knowledge concerning the length of time that a person will teach as a regular teacher in the Orange County School before his contract is finally taken up by the School Board? Can that go one, two, three, four or six months? A. It could conceivably go for some length of time until all the papers and the requirements are in order.

Q. Now, during that period of time would the person be paid? A. I would assume that he or she would be paid, but again I have no personal knowledge of how or how much they would be paid.

Q. But they would be paid something, would they not? A. I would assume so.

Q. Do you—you have no knowledge or information that would lead you to assume the contrary? [287] A. I have stated that.

Q. Do you know why Mrs. Connell who taught for some seven weeks in Callahan Elementary School was not paid? A. I do not know that she was not paid.

JUDGE SIMPSON: Can't we stipulate that she hasn't been paid?

MR. BUFORD: Yes, Your Honor.

JUDGE SIMPSON: It is agreed between the lawyers—they agreed that she hasn't been paid. Do you know why she hasn't been paid?

THE WITNESS: I do not.

MR. BORNSTEIN: I further proffer to stipulate with counsel that the sole reason that she wasn't paid was because she didn't sign the Loyalty Oath.

MR. BUFORD: We would stipulate, Your Honor, that the reason Mrs. Connell has not been paid for the services she has performed is because of prohibition of the statute which prohibits payment to those who have not signed the Loyalty Oath.

MR. BORNSTEIN: I believe it is Section 875.06 of the statute.

MR. BUFORD: .08, I believe.

JUDGE SIMPSON: Whichever it is, the prohibition of the statute is the stipulated reason.

BY MR. BORNSTEIN:

[288] Q. When a teacher's contract is presented to the School Board for approval, is information given to the School Board as to how long that teacher has been teaching in the Orange County School System? A. The contract as such is not presented to the Board. The Personnel Committee reviews the records of this applicant and the contents thereon could have the information as to how long the applicant has been in a particular classroom.

Q. Who signs the actual contract of employment with the teacher? A. The actual contract, I do not know.

Q. You do not? A. I would assume Mr. Higginbotham would.

Q. At the School Board meetings does the School Board take up ratification of teachers' contracts of employment? And does it approve them? A. We do.

Q. Mr. Higginbotham says "I am going to sign with your approval a contract for employment for Miss Jones, Miss Smith, Miss so and so, and I ask your approval" and the school Board either approves or disapproves. A. On the agenda for the business meeting is the matter of appointments, leaves, resignations and transfers of the instructional and non-instructional personnel. If these are approved by the Board sitting in official session, I would [289] assume then that a contract would be issued.

Q. In your experience, customarily, does the School Board ratify and approve the recommendation of the school superintendent?

MR. BUFORD: I would object to that question inasmuch as there has been no showing that there has been any recommendation of this teacher by the superintendent to the School Board, therefore the question is irrelevant to the issues in this cause.

MR. BORNSTEIN: Your Honor, we are merely inquiring into the procedure, not about what specifically happens in this case.

JUDGE SIMPSON: The objection is overruled.

MR. BORNSTEIN: Read the question back, please.

(Last question read back by court reporter.)

THE WITNESS: Customarily, yes.

BY MR. BORNSTEIN:

Q. Are you familiar, Mrs. Breeze, with the salary that is paid to a teacher with the rank of MFP-3? A. I don't understand MFP, Mr. Bornstein.

Q. Rank 3, are you familiar with the salary paid to the Rank 3, teacher? A. In general, yes.

Q. The lowest starting salary. A. The lowest starting salary, without experience, would be [290] $6,000.00, I believe, annually, 196 days.

MR. BORNSTEIN: We have no further questions, Your Honor.

CROSS EXAMINATION

BY MR. BUFORD:

Q. Mrs. Breeze, in the employment of the teacher is it correct that before a contract is issued to a teacher, if she fulfills all the qualifications for the position, including certification, that a recommendation is made, nomination is made by the principal to the superintendent's office—this nomination is considered by the superintendent and that he may or may not recommend this teacher for employment by the School Board and that if he does recommend, the School Board Personnel Committee then considers his recommendation and may or may not recommend to the entire Board that the teacher be employed, and if they do recommend that the teacher be employed, then they may have—the School Board may then or may not determine to issue a contract to that teacher? A. This is correct.

JUDGE SIMPSON: Customarily, as I understand the prior answer, they customarily follow the recommendations and it is just a matter of a rubber stamp and recommendation on the official board action of what he recommends.

THE WITNESS: The Board action may be rubber stamped, Your [291] Honor, but the recommendation of the School Committee is not.

JUDGE SIMPSON: I understand, but the whole Board is not going into the minute detail of each teacher in the school system. You couldn't do that—there is not enough hours of the day to do it and they don't get paid enough.

BY MR. BORNSTEIN:

Q. Mrs. Breeze, at what point does the Personnel Committee investigate the qualifications and ability of a teacher? A. The Personnel Committee at the present time meets twice monthly. On that agenda would be the nominations to fill vacancies that have occurred in the past two weeks, nominations for new schools which we may be opening next September, for anticipated vacancies due to resignations of one type or another.

Q. Specifically if a teacher began teaching in the school system on January 27, 1969, customarily when would her

qualifications come into consideration before this Personnel Committee? A. I cannot answer, Mr. Bornstein, because when the applications or nominations, if you will, come us we may not have knowledge of when that teacher began teaching in a particular classroom.

Q. Mrs. Breeze, I hand you a copy of Exhibit 2 of the prior [292] hearing. Is that the form nomination that you are referring to? A. This? (indicates)

Q. Yes ma'am—the nomination by the principal. A. This is the type of material that would be provided to us on every candidate.

Q. Granted, but normally, is this the document that triggers the consideration by this Personnel Committee? A. Yes, I believe that is a fair statement.

Q. The Personnel Committee wouldn't do anything until the principal says "I want this girl or this man to start teaching here." A. The principal or Personnel Office.

Q. Either one or the other at that point and it would then possibly go to your committee and my question is what is the time lapse between the Personnel Director's office serving this nomination form and the time this is reviewed by your Personnel Committee?

MR. BUFORD: If it please the Court, the witness already testified she doesn't know and I think it is a repetitious question.

JUDGE SIMPSON: I am not sure it is the same thing—let's go ahead and take the answer.

THE WITNESS: I cannot give you any date, Mr. Bornstein, because as I say there is nothing particular in the [293] record which it is provided to us, which would indicate when this applicant began teaching or in fact whether she has begun yet.

BY MR. BORNSTEIN:

Q. Well in some point in time somebody in the School Board must know that a person is teaching in the school system and do something about it, is that not correct, Mrs. Breeze? A. I would assume that to be correct, yes.

Q. How does this take place? How does somebody in authority find out that somebody is teaching and make a determination whether that person should continue teaching or should be told to get out of the classroom? A. I don't understand the question.

MR. BORNSTEIN: Read the question back, please.

(Last question read back by court reporter.)

THE WITNESS: How does somebody in authority find out somebody is teaching in the classroom?

BY MR. BORNSTEIN:

Q. Right. A. If there is a vacancy existing, this fact is reported to the Personnel Office.

Q. Right. A. If there are applicants on file, they are given notice that a vacancy exists in a particular school and they are sent out there. If they are acceptable to the principal, she [294] notifies the Personnel Office that this person is acceptable. She sends in the little form we have here.

Q. That is this Exhibit No. 2? A. The nomination for employment. The Personnel Office then begins to compile all those legal documents which are required for employment, to process her certificate if necessary. Everything else, as I say, that is required—when these things are in order, the references are in, and it is then brought to us.

JUDGE SIMPSON: You cannot be any more particular or more specific about the time because it varies—I understand from what you say the time lag varies in different cases and it would run from several weeks to several months, is that correct?

THE WITNESS: I think as nearly correct or specific as I could be, Your Honor.

JUDGE SIMPSON: All right. We have a lot to get over and I would appreciate it if you would pay attention to the questions and try to answer them the best you can. Don't raise objections in your mind—let the lawyers raise the objections.

BY MR. BORNSTEIN:

Q. Are you familiar, Mrs. Breeze, with the form that was admitted into evidence as Plaintiff's Exhibit No. 5 at the last hearing? [295] A. Generally, Mr. Bornstein.

Q. Now, does this document mean that in due course a teacher's certificate will be issued? A. Not necessarily.

Q. Do you know what it does mean? A. According to the statement across the top, it acknowledges that the application has been received and is an official receipt for the payment of the fee. It does not state that a teacher's certificate will be issued.

Q. I hand you Exhibit No. 8 which normally accompanies No. 5 and ask if you are familiar with the Exhibit No. 8. A. I am not.

MR. BUFORD: I object to the form of the question, if it please the Court. There has been no—

JUDGE SIMPSON: Rephrase the question, please.

BY MR. BORNSTEIN:

Q. Have you ever seen Exhibit No. 8 before, Mrs. Breeze? A. No.

Q. Do you know whether or not teachers can be paid once they have been issued by the Department of Education—this Exhibit No. 5 form? A. I do not know whether they can be paid.

Q. Does your Personnel Committee ever get activated to consider a teacher's qualifications before the final teacher's certificate has been issued by the Department of Education in [296] Tallahassee? A. The Personnel Committee meets, as I say, twice a month. We do consider applicants whose certificates have been requested but not yet issued.

Q. In other words, if a teacher, as you described it, fills a vacant position, would that teacher's qualifications normally be considered at the next regular meeting of the Personnel Committee? A. Depending I would think on how far the records were.

Q. Now, which records are you specifically referring to—the recommendations? A. The recommendations, the character references—

Q. Who makes the determination whether or not the records are complete enough to be presented to the Personnel Committee? A. The superintendent.

Q. Was Mrs. Connell ever considered by your Personnel Committee? A. Not that I know of, Mr. Bornstein.

Q. Do you know the reason why she has been considered by your Personnel Committee? A. No.

MR. BORNSTEIN: No further questions, Your Honor.

JUDGE SIMPSON: As I understand it, the superintendent gets all of the papers together and they go to the Personnel Committee and you check them over and if you approve [297] them, the next regular Board meeting or business meeting of the Board the superintendent moves for the employment—that is in general?

THE WITNESS: In general, yes.

JUDGE SIMPSON: All right, thank you.

JUDGE SCOTT: You may step down.

(Witness excused.)

JAMES M. HIGGINBOTHAM,

having been produced and first duly sworn as a witness herein, testified as follows:

DIRECT EXAMINATION

BY MR. BORNSTEIN:

Q. Would you state your name, please sir? A. James M. Higginbotham.

Q. Where do you live, Mr. Higginbotham? A. 2614 Ardley Drive, Orlando, Florida.

Q. Are you here in accordance with plaintiff's subpoena duces tecum in this cause? A. Yes.

Q. Are you presently employed? A. Yes.

Q. In what capacity? A. Superintendent of Public Instruction, Superintendent of Orange County School System.

Q. How long have you been so employed? [298] A. Two years, eleven days.

Q. And you have had prior experience in the official school family, do you not, Mr. Higginbotham? A. Yes, I do.

Q. Would you describe that for the Court, please? A. I was an Assistant Superintendent for two years prior to Assistant, I was Co-ordinator of Secondary Schools, and prior to that I have also served as an Elementary Principal in schools in the county and as a teacher.

Q. In your experience in all these various positions, would you concur in the procedures as testified to by Miss McDonald, basically, in the hiring of a teacher, rather than repeat it again? A. Up to a point.

Q. Well, then would you care to describe for the Court your understanding of the procedure for hiring a teacher who seeks employment for the first time in Orange County, Florida, after the commencement of the school year, what would happen? A. May I come to the point of the principal sending the nominations form? I agree up to that point. At that point the screening of records begins and when the records are relatively complete; when they contain the necessary number of recommendations and other attachments, they are forwarded to me for consideration regarding whether I will join in. If I do join in, then that nomination form comes in together with [299] the personnel application, the references and such other data as may be available and pertinent, and is placed by me or by my representative on an agenda. The agenda is what keys the action of the Personnel Committee, that agenda constitutes a recommendation on my part, then the Personnel Committee reviews the items placed on that agenda and is free to take whatever action it will in terms of striking or placing a recommendation jointly with me to the entire Board.

Q. Would you state again what makes a file complete, which would be the point at which you put it on the agenda—what should be included in the file at that time? A. At that particular time we will accept it with the personnel application form, some indication of eligibility for a certificate and three satisfactory references. We will accept two, if we have anything to substantiate the acceptance of two.

Q. I hand you Exhibit No. 5 from the previous hearing and ask if that is evidence that a temporary certificate will be issued that you referred to? A. This could be one of the forms of evidence. Application through our office and frequent telephone calls which we make on a series of applications may also be other evidence.

Q. In other words, if you had to repeat what you said, the application for a certificate, the form or something equivalent that you are looking at now—Exhibit No. 5, from the [300] previous hearing, plus the letters of recommendation, that would be sufficient to put this matter on the agenda for teacher consideration? A. It could be, if I had no other knowledge which would prevent it from going on.

Q. In the case of Mrs. Connell, do you know whether or not any inquiry was made by your office of by Miss McDonald's office or any official of the School Board to determine whether or not she was eligible for certification? A. No, I do not.

Q. What generally is the period of time following the commencement of teaching duties by a teacher to the completion of this process in the issuance of a contract? A. There is no set period of time. We attempt to handle this as rapidly as we can.

Q. Is the teacher retained in his or her position during this period and until consideration by you and then the Personnel Committee then finally by the School Board? A. The teacher is on a substitute basis on a day to day basis until such time as her application has cleared me, the Personnel Committee, and the School Board and favorable action has been taken by the Board. The Board is the final determining agent regarding permanent employment of a teacher.

Q. At what rate is a teacher paid during this period of time? A. The teacher may be paid during this period of time or may not [301] depending on what is available.

Q. If all the papers were in, would the teacher be paid during this period? A. She may or may not be—it would depend.

Q. Under what circumstances would the teacher not be paid during the sixty day period? A. If the particular—if there were particular documents missing from her file, which the law requires before you issue a check as her employer.

Q. Which documents are you referring to specifically? A. The Loyalty Oath is one of these, I believe the certificate is also one, as far as payments on rank and experience basis is concerned.

Q. Let me ask you this. Suppose a teacher had her Florida certificate showing Rank 3, but did not have the letters of references. You could not put that on the agenda for the Personnel Committee, could you? A. No, this is correct.

Q. Suppose the letters of references took sixty to ninety days to get in, but you did have a certificate to show Rank 3, would that teacher be paid during the sixty day period? A. Not for the first ten days, but she might be after that. However, you would make the Board aware of this fact.

Q. Using my hypothetical—the Loyalty Oath is in the file, the teacher's certificate and everything is in the file, [302] except letters of recommendation and for some reason it takes sixty or ninety days to get them, would the teacher be paid at Rank 3 level prior to the School Board acting upon it? A. Yes, provided you didn't interpose—you would telephone the references, if you had a vacancy and had a teacher working as a substitute and everything but the letters of recommendation are in.

Q. Are oral recommendations sufficient? Is a telephone call enough? A. We have employed teachers on certified telephone recommendations.

Q. And where in contracts have been issued with no written letters of recommendation in the file? A. Yes, this is correct.

Q. During this interim period and before the teacher's written contract is issued by your office, you are the person who signs such a contract, are you not, Mr. Higgin-

botham? A. The contract is signed on a machine in the office using a cylinder which is kept on a security basis. It is signed by myself and the Chairman of the Board, after the Board has taken favorable action.

Q. But my question is prior to that final paper which is machine signed, which is ultimately sent to the teacher prior to that point, if there are any complaining criticisms [303] or evaluations of such a teacher, where would these forms be maintained or to whom would they be made? A. In the Division of Personnel. They would be under the supervision of Mr. Turner Hammond or myself, or Pauline McDonald.

Q. As of March 17, 1969, the date of the prior hearing, do you know, Mr. Higginbotham, of your own personal knowledge whether or not there were any written complaints or criticisms or what have you in Mrs. Connell's file as you described it? A. There were none to my knowledge.

Q. As of that date on March 17th? A. That is correct.

Q. Do you concur with Mrs. Breeze that the salary of a teacher Rank 3 or MFP-3 is $6,000.00 a year? A. That is the beginning salary.

Q. That is the lowest salary at that rank? A. That is correct.

Q. And that would be for a teacher qualified to be Rank 3, but without experience? A. Yes.

JUDGE SIMPSON: What does MFP mean?

THE WITNESS: Minimum Foundation Program. It is used to identify the pay status of the teacher.

MR. BORNSTEIN: We have no further questions, Your Honor.

CROSS EXAMINATION

[304] BY MR. BUFORD:

Q. Mr. Higginbotham, in the employment process are there ever instances where a principal may make a recommendation to you and you do not concur in the recommendation? A. Yes, sir.

Q. Can you cite specific instances of this? A. I have a list—

MR. BORNSTEIN: Your Honor, we object to specific instances as being irrelevant and immaterial. Examples or customs or practices I think would be proper but specific instances would not be relevant here.

JUDGE SIMPSON: Sustained. Objection sustained.

BY MR. BUFORD:

Q. Following one step further, Mr. Higginbotham, are there instances where recommendations may be joined in by you to the Personnel Committee of the School Board and the School Board Personnel Committee not concur in those recommendations? A. Yes sir, this has happened.

Q. This has happened in the past? A. Yes sir.

Q. Have there been instances of teachers working in a regular teaching position who have not been appointed by the School Board? A. Yes sir.

[305] Q. Have examples of all these circumstances occurred as recently as last year? A. Yes sir. Counselor, may I clarify a point on the previous answer?

Q. All right, sir. A. I gave you a flat yes sir, and this is correct. In essence however, during the period of time that those teachers who have not been appointed by the Board are working in a regular position, they are working as substitutes on a day to day basis.

Q. All right, sir. What is the status of Mrs. Connell's application for employment with the School Board?

MR. BORNSTEIN: Objection, Your Honor. It calls for a legal conclusion on the part of this witness.

JUDGE SIMPSON: It is not entirely legal. It is hung up somewhere and this is the man in charge and I think he may tell us what he knows about it. All right, that is assuming my colleagues and I are able to sort out the facts from the law. What happened to this lady's application?

THE WITNESS: It has been screened by the Personnel Office insofar as references are concerned. It has been accompanied by the nomination form from Mrs. Estelle Banks, the principal of Callahan School, and has been forwarded

back into the Personnel Office and has not [306] received received favorable action from me. I have not recommended Mrs. Connell to the Personnel Committee.

BY MR. BUFORD:

Q. Disregarding for a moment the Loyalty Oath question, are there matters other than Loyalty Oath which you feel compelled to consider in determining whether or not you shall recommend Mrs. Connell? A. Yes sir.

Q. Would you tell us what those matters are? A. We do not have in our possession, although I have seen the receipt for the certificate, but we do not have a certificate stating the areas in which Mrs. Connell would be adjudged competent by the State Department of Education, and we do not have the document which you mentioned, and we do not have the signed code of ethics form—these are things—

JUDGE SIMPSON: What was that last?

THE WITNESS: The code of ethics form which is a normal part of our employment procedure, Your Honor.

JUDGE SIMPSON: This is in addition to lacking the Loyalty Oath?

THE WITNESS: Yes, sir, this is a professional document which comes under the PRR Commission. In addition to that, at this time I am in possession of some information which came out at the March 17th [307] hearing that the principal of this school might not continue her recommendation or that there might be a question regarding Mrs. Connell's performance which I should verify further prior to making a definite recommendation.

BY MR. BUFORD:

Q. Do you customarily consider questions of performance and ability of a teacher in making recommendations if the information is available to you? A. Yes sir, very definitely.

Q. What part does this consideration play in your determination of whether to make or whether to withhold the recommendation to the Personnel Committee? A. If there is ever evidence that the teacher would be satisfac-

tory and would perform well in the classroom throughout the entire range of the classroom duties, through the disciplinary and presentation of the subject material—this would influence me then to make a recommendation to the Personnel Committee. If, on the other hand, any one of these appear to be in question, I would attempt to verify that, if I had evidence or some reason to believe that one might be in question, I would attempt to verify it, either for or against, prior to making a recommendation.

Q. From your experience in the field of education which has been considerable, do you believe these factors to be of [308] importance to the school system or to its students in making such recommendatons? A. Yes sir, I do.

JUDGE SIMPSON: Mr. Higginbotham, when you see counsel about to make an objection, wait and let that objection come in. Don't try to beat him.

THE WITNESS: I saw him get up out of the corner of my eye, Your Honor.

JUDGE SIMPSON: Delay your answer rather than hurrying your answer.

MR. BUFORD: No further questions, Your Honor.

REDIRECT EXAMINATION

BY MR. BORNSTEIN:

Q. Mr. Higginbotham, I hand you a document headed "State of Florida, Department of Education, Teacher's Certificate" for Stella Connell. To your knowledge is that an authentic certificate? A. Yes, sir, it is. I would accept it as one.

Q. If that were in the file, you would accept it as such? A. Yes, as a valid teacher's certificate covering the area of Sociology with MFP-3 and Rank 3.

MR. BORNSTEIN: Do you have any objection to introducing a copy of this in evidence rather than the original?

MR. BUFORD: No objection.

JUDGE SIMPSON: Do you have a copy of it handy there?

[309] MR. BORNSTEIN: Yes, sir, I do, Your Honor.

THE CLERK: Plaintiff's Exhibit No. 10.

JUDGE SIMPSON: Is this a xerox copy?

THE CLERK: Yes sir.

JUDGE SIMPSON: All right.

(Thereupon, the document last above referred to was received and marked in evidence as Plaintiff's Exhibit No. 10).

BY MR. BORNSTEIN:

Q. Does this certificate indicate eligibility to teach at the elementary school level? A. No sir. In order to qualify the holder of that certificate to teach at an elementary level, I would have to ask for a special permit, which is not unusual circumstance—we do that from time to time.

Q. Normally, is such a permit granted? A. Yes.

Q. Would teachers be employed, knowing that this situation would arise and a special permit would have to be requested? A. Yes, we have followed this procedure.

Q. Now, the first time you heard anything about Mrs. Connell's qualifications was on March 17th when you listened to Mrs. Banks testify, was it not, Mr. Higginbotham? A. Would you clarify what you mean by qualifications, please?

Q. Qualifications as to her teaching ability? A. You mean her classroom performance?

[310] Q. Right. A. Remember this is the first time I had any official word or indication there was one—I might look further into it.

Q. Have you discussed this matter with Mrs. Banks since that time? A. She indicated at the end of the last hearing which was March 17th, and asked if she had to continue Mrs. Connell in that position and I told her to get a substitute satisfactory to her.

Q. At that time you told her if the Court did not grant the temporary restraining order that Mrs. Connell should not report back on the 18th? A. I believe that is what I said.

Q. Have you made any other effort though to follow up with Mrs. Banks to find out about Mrs. Connell's classroom ability and performance? A. No sir, I have not.

Q. Why not? A. I have had another nomination placed before me for this particular position. This constitutes a withdrawing of Mrs. Connell's nomination by the principal. I have considered that one favorably and have forwarded it to the Personnel Committee. They considered it favorably, but at this time the School Board has not.

[311] Q. Has the other applicant for the same fourth grade position signed the Loyalty Oath? A. Yes, I am sure she has.

Q. And based on the fact that as of this time you have another applicant who is still not in the classroom teaching, you have made no further effort to determine what Mrs. Connell's classroom performance is? A. I don't believe I stated that she was not in the classroom teaching.

Q. You heard Mrs. Banks testify that she says she has a substitute teacher teaching there in the classroom now? A. I believe this lady is on a substitute basis, just as any other teacher is until such time as the Board takes action on her, but I believe she is in the classroom performing those duties and as a substitute.

MR. BORNSTEIN: May we recall Mrs. Banks when we conclude here? It was my understanding of Mrs. Banks' testimony Your Honor, that the lady now teaching in this classroom has a substitute certificate.

JUDGE SIMPSON: She said the position had been filled by a substitute—not the same one, since March 18th to date.

MR. BORNSTEIN: She also said, Your Honor, as I understood the person now filling that position carries a substitute certificate and not a regular teaching certificate.

[312] JUDGE SIMPSON: Maybe you can confer with counsel and you can agree. Certainly we will not interrupt the examining of Mr. Higginbotham. He can only say what he understands and what he knows. If it is different, it is different. If we have to make credibility between him and Mrs. Banks on this point we will do it.

BY MR. BORNSTEIN:

Q. Do you know the name of the person who has been recommended for Mrs. Connell's position? A. Mary K. Hall.

Q. Have you seen her teacher's certificate? Have you reviewed her file yourself? A. I reviewed her file at the time she was nominated or recommended to me and by me to the Personnel Committee. This is the teacher, by the way, who is on leave of absence from Orange County and taught in Orange County prior to this, which may cast some light on the certificate status.

Q. When was the recommendation made by Mrs. Banks, do you recall? A. No, I do not. It was covered in the Personnel agenda yesterday though.

Q. Would you give me the name again, please, Mr. Higginbotham? A. Mary K. Hall.

Q. And it is your impression she is presently in that classroom? [313] A. That is correct.

Q. Mr. Higginbotham, are you familiar with the Florida Statutes and rulings and regulations concerning the employment and use of substitute teachers by a Board of Public Instruction? A. Yes, I am.

Q. Do these statutes, rules and regulations limit the length of time that a substitute teacher—by substitute teacher now I mean a teacher with a substitute certificate only, can be used continuously teaching one particular class?

MR. BUFORD: May it please the Court, I must object to Mr. Bornstein's examination. It is going beyond the realm.

JUDGE SIMPSON: Isn't that what you asked the witness?

MR. BUFORD: My point is that it goes beyond the scope of the redirect examination.

MR. BORNSTEIN: On cross examination counsel pointed out that the teacher was appointed on a day to day basis as a substitute.

JUDGE SIMPSON: I think it is all within the scope. You do not object that he is asking for what the statute says? I might sustain it on that ground.

MR. BUFORD: I do believe the statute speaks for itself.

JUDGE SIMPSON: If he wants to bring it to our attention, I think he can bring it to our attention in the argument. The witness testified he is familiar with the [314] law and and then he asked what the law was. That is the way I understood the question.

MR. BUFORD: That is correct. I would object to his testimony as to the contents of the law. The law speaks for itself.

JUDGE SIMPSON: Of course, he may have a question of fact to base on his answer, that he is familiar with the law. I don't know. I am certain that if I am in doubt as to what the statutes provide, I will get the book out and look at it and not go on what Mr. Higginbotham says with reference to what it is.

MR. BORNSTEIN: May I withdraw that question?

BY MR. BORNSTEIN:

Q. Pursuant to the subpoena, did you bring with you copies of the rulings, regulations, and other documents pertaining to the substitute teacher qualifications? A. Yes sir. I included in these the specific point which you covered which is 231.47.

Q. Mr. Higginbotham, Chapter 231 of the Florida Statutes, Personnel School System—what is the reference that you made to the particular section? A. I believe 231.47 covers that period of time.

Q. 231.47—under the Florida law, Mr. Higginbotham, as Superintendent of Public Instruction, are you authorized to put a person with a substitute teacher's certificate in a classroom [315] for more than ten consecutive days? A. Yes sir, I believe so.

Q. Does 231.47 say so? A. I believe it says about two-thirds of the way down "provided that a person who is not properly certificated may be employed as a temporary substitute only in cases of emergency as authorized under regulations of the County Board". Our Board requires that a substitute be in the classroom in the absence of a teacher.

Q. Now, since January 27, 1969, has the County School Board promulgated any regulations pertaining to emergency use of substitutes? A. No.

Q. Under the present statutes of the system here in Orange County, are you authorized at the present time to use substitute teachers in a classroom for more than ten continuous consecutive days? A. If there is no other person available, yes.

Q. By other person, do you mean a teacher holding a regular certificate? A. Yes, a regular teacher.

JUDGE SIMPSON: If the ten days ran out and you didn't have a regular certificated teacher ready to put in there, would you keep the same substitute in there or switch over and have another substitute to technically comply [316] with the law?

THE WITNESS: On our operating procedure and Board policy we can keep the same substitute. The difference is if the same substitute is on a ten or twelve basis—whatever the bottom is on the particular case and held some type of certificate and could establish it at that time, we would begin to pay full rank and for that person's services beyond the ten days, but we do have established a precedent—

JUDGE SIMPSON: You construe the emergency provision of the statute to give you the right to keep the same substitute in there longer than the ten days, if you don't have a regular certificated person ready to move in there at the time?

THE WITNESS: Yes sir.

JUDGE SIMPSON: All right.

BY MR. BORNSTEIN:

Q. Now, you heard Miss McDonald testify, did you not? You heard Miss McDonald testify this morning, did you not? A. Yes, I did.

Q. The list of vacancies that she keeps in her office are vacancies for teachers with regular certificates, are they not? A. This is correct.

Q. When a person fills a job—a teaching job, and starts [327] teaching at a vacancy on Miss McDonald's list, are they going to get paid at ten, twelve, or fourteen dollars a day on the day they commence teaching? A. They may until the Board takes action, then the pay is made retroactive to the first day of service.

Q. In other words you are saying that they have a temporary substitute situation which becomes a regular pay situation upon issuance of the employment contract? A. This may be the case, yes sir.

Q. Is it, or is it not? A. It may be, depending on the circumstances. If you have a complete file, you do not have a problem. If you do not have a complete file probably this is the procedure you would normally follow.

Q. Assuming, Mr. Higginbotham, that this teacher's certificate had been in Mrs. Connell's file on January 27th, and you had no references and what have you, and the rest of the documentation that would be required to complete the file for the Personnel Committee and the first pay period came around would she be paid customarily at the lowest pay rate or Rank 3 rate? A. We would have paid her at the Rank 3 rate for substitutes.

Q. Would you refer me to the statutory provision that pays substitutes—are they substitute teachers at that point? A. Yes sir.

[318] Q. I understood a substitute teacher to be— A. Let me find the salary schedule.

Q. Mr. Higginbotham, is not a substitute teacher a person who holds a substitute teacher's certificate or else who is teaching on a part time basis? A. A substitute teacher is a teacher under the rules and procedures of this County—a substitute teacher is a teacher who is in the classroom and in the place of the regular teacher or in a vacancy created by the regular teacher's leaving, prior to the position being filled.

Q. In other words, this is a unique definition by the Orange County Board? A. No sir, I don't think so.

Q. Do you have any state rules and regulations with regard to this substitute teacher? A. I think so.

Q. Find it for me, please. A. I think 231.47 covers this, although I do not hold myself out as an attorney and expert in the law.

Q. Would you read the applicable language that you think says what you are saying? A. "Provided that a per-

son who is not properly certificated may be employed as a temporary substitute only in cases of emergency as authorized under regulations of the County Board."

[319] Q. Mr. Higginbotham, we are hypothesizing that the teacher has the certificate in the file, but has not completed the rest of the papers—that is the hypothetical that I gave you and your answer to me was— A. Our difference would be that we would pay her for the certificate which is available.

Q. That person is not a substitute teacher, Mr. Higginbotham? A. Yes sir, she is certainly a substitute teacher until appointed by the Board—

Q. Show me the language—

JUDGE SIMPSON: Let him finish answering the question before you start speaking, please.

THE WITNESS: This teacher is a substitute teacher until he or she receives a written contract from the Board.

MR. BORNSTEIN: Would you read back the last question, please?

(Last question read back by court reporter.)

BY MR. BORNSTEIN:

Q. This is assuming that you have a teacher's certificate in the file and that the file is not complete. A. We have a certificate in the file and the file is not complete?

Q. Otherwise it is not complete—you do not have the letters of recommendation, for example. A. All right, sir. Now, you are talking about a contract. [320] The difference between a contract and not holding a contract is this what I am to understand in answering the question?

Q. My question specifically is this. What are the issues of fact in this case whether or not Mrs. Connell was or was not a "substitute" teacher. I am asking for the statutory language or rules or regulations which provide that a teacher who holds a regular certificate and prior to the issuance of the employment contract is a "substitute" teacher. A. All right, sir. I think I need some help in the terms of understanding this thing. I would refer first to 231.35. The portion involving filling vacancies.

MR. BUFORD: May it please the Court, I must again object to these questions calling for a legal conclusion of this witness. These matters are for the Court to determine.

JUDGE SIMPSON: I tried to get you to make the objection a while ago and you wouldn't make it.

MR. BUFORD: I beg your pardon, Your Honor. I misunderstood you. I do make the objection now, Your Honor.

JUDGE SIMPSON: I think maybe we are a little passed this.

We are trying to find out how this witness, as superintendent applies the statute and it seems to me I think we might let him go ahead. I do think we may be wasting [321] time on this. We are beating this thing pretty hard.

THE WITNESS: Chapter 231—the statutes provide for the procedure necessary to appoint a teacher and the final provision is for the School Board to take positive action in terms of appointing that teacher after proper recommendations have come through. I must assume that a teacher properly appointed by the School Board does not exist in a classroom until such time as the Board has taken positive action. I then must assume that that person is there on a substitute basis not under contract, and not entitled to the provisions and protections of a contract. I apologize for not doing a better job, counselor. I am not an attorney.

BY MR. BORNSTEIN:

Q. I apologize for pursuing this. I think you did very well. At this point, Mr. Higginbotham, you are aware that Mrs. Connell has a teacher's certificate. It has been submitted in evidence. You mentioned that the code of ethics form has not been signed by Mrs. Connell. That is not in the file. Now, with regard to the information that you got from Mrs. Banks, could you state for the Court exactly what you recall that Mrs. Banks said at the last hearing?

A. Mrs. Banks made a general answer in regard to your examination in which you were questioning the qualifications, I believe of Mrs. Connell specifically, and I believe Mrs. [322] Banks made a general statement to the effect that if a teacher could not control her classroom she would

not be qualified to teach. Did Mrs. Banks testify that Mrs. Connell could not control her classrooms, do you recall?

MR. BUFORD: If it please the Court, there is a record of this.

JUDGE SIMPSON: That is right.

BY MR. BORNSTEIN:

Q. At this point you have made no further inquiry from Mrs. Banks with regard to Mrs. Connell's classroom abilities? A. No sir, that is correct.

JUDGE SIMPSON: He said that.

BY MR. BORNSTEIN:

Q. At this point the only three matters then that remain before you would either make or not make a recommendation to the Personnel Committee with regard to Mrs. Connell's written contract of employment would be the execution of the signed code of ethics and the execution of a loyalty oath and further inquiry from and a discussion with Mrs. Banks? Is that correct? A. No sir, not at this point.

Q. In other words, will you explain that? A. Yes. Mrs. Banks has made a nomination with regard to the appointment of one Mary K. Hall, or the return of Mary K. Hall from leave of absence. She can obviously not make two [323] nominations for one position, therefore, this matter would have to be clarified also.

Q. Are there any other teacher vacancies available in the Orange County System at the present time? A. I am sure there are, but I cannot testify as to where.

Q. But there are vacancies? A. I think so, I do not know.

Q. If Mrs. Connell executed a Loyalty Oath, Mr. Higginbotham, would you consider her for employment in another vacant position in Orange County, tomorrow? A. I would still inquire into the matter covered by Mrs. Banks in her last question or the last court hearing.

MR. BORNSTEIN: I have no further questions.

* * *

[324] ESTELLE BANKS,

having been previously produced and sworn as a witness herein, resumed the witness stand and testified further as follows:

DIRECT EXAMINATION

BY MR. BORNSTEIN:

[325] Q. Mrs. Banks, you have been previously sworn, have you not? A. Yes, I have.

Q. Would you state for the Court the name of the person who is presently teaching in the classroom in which Mrs. Connell taught prior to March 17th? A. Mary K. Hall.

Q. When did Mrs. Hall begin teaching that class? A. As near as I can remember, April 1st.

Q. Do you know whether or not Mrs. Hall holds a regular or substitute teacher's certificate? A. She holds a Rank 3 certificate.

Q. Did she ever teach for you before? A. No, other than through substitution—she subbed for the teacher who had the heart attack.

Q. Did you discuss with anyone from either Miss McDonald's office or Mr. Higginbotham's office or anyone at the School Board of the necessity for obtaining a replacement teacher for the class formerly taught by Mrs. Connell? A. Ask the question again. I am not sure I understand.

MR. BORNSTEIN: Please read back the last question.

(Last question read back by court reporter.)

THE WITNESS: Yes, I have need for a regular teacher.

BY MR. BORNSTEIN:

Q. My question was did you discuss it with anyone—did you call Miss McDonald and tell her you had a vacancy?

[326] A. I didn't think it was necessary. I thought she knew.

Q. Did anybody call you or did you call anybody with regard to getting a replacement for this classroom? A. The only thing I did relative to this classroom after Mrs. Con-

nell was not to return, was to make a recommendation to the Personnel Department and that I did.

Q. Did you request the Personnel Department to send you applicants for this position? A. No, because the person was already in my building that I recommended.

JUDGE SIMPSON: She had been substituting for the heart attack lady. The heart attack lady came back the 1st of April, and you put her recommendation in for the fourth grade?

THE WITNESS: The fourth grade, that is right.

BY MR. BORNSTEIN:

Q. She had been teaching a different class in your school since January 1st? A. That is right.

Q. Did you ever observe Mrs. Connell in the classroom? A. Yes.

Q. On one or more than one occasion? A. Beg your pardon?

Q. On one or more than one occasion? A. I have gone in on several occasions.

[327] Q. Into her classroom? A. Yes.

Q. And you watched her teach and handle the children? A. To be frank with you, I didn't have to go in to watch the children. She sent the children to me.

Q. Would you explain that, please? A. Well, she wasn't able to handle them and she sent them to me and I kept a room full of them just about every day.

Q. How many children did Mrs. Connell send to you every day? A. I wouldn't—I would be afraid to say because I may be wrong but she sent several every day.

Q. Did you ever talk to Mrs. Connell about her sending children to you for disciplinary action? A. Yes, I did, because I explained this to her, that I could come in and sit in the room all day and it wouldn't help her and she could send the children to me and it wouldn't help her and that she had to handle her own situation because after all if she couldn't as soon as children find out that they are going to be sent elsewhere, they are going to take advantage of the situation.

Q. Now, when was the first time that Mrs. Connell sent children in to you for disciplinary reasons? A. I wouldn't be able to state that.

Q. You don't know whether it was January 27th or close to then? A. No.

[328] A. Just about.

Q. Do other teachers send children? A. No.

Q. Now, when this fourth grade class was formed, was it formed from the existing two fourth grade classes? A. That is right.

Q. Was there any particular selection in determining which children would be assigned to Mrs. Connell's class? A. Yes. We attempt to group children according to their ability and it was on that basis that she was given those children.

Q. Now, did Mrs. Connell get the children of the lower ability or the medium ability or the high ability? A. Well, she got the children of the lower ability.

Q. This was despite the fact that you had two experienced teachers already teaching fourth grade? A. That is right, but I feel this way about it. Since those teachers had been there and had been working with the children, I didn't feel it was quite fair to tear away from them the children that they felt close and dear to, at least they should feel close and dear to all of them, but they wanted those children and I permitted them to keep them.

JUDGE SIMPSON: You let both the other two teachers, in effect, cull their classrooms to fill this new room [329] and that is what you did?

THE WITNESS: That is right.

JUDGE SIMPSON: Sort of rejects?

THE WITNESS: I wouldn't say that.

JUDGE SIMPSON: Potential drop-outs, or whatever you want to call them.

MR. BORNSTEIN: Problem children, Your Honor.

THE WITNESS: There were also problem children in the other classes—they have problem children too, but they are able to handle them.

BY MR. BORNSTEIN:

Q. If Mrs. Connell had signed the Loyalty Oath and none of this litigation and mess had ever arisen, Mrs. Banks, would Mrs. Connell been teaching at Callahan today, everything else being the same?

MR. BUFORD: I object to that, Your Honor, it calls for information that the witness doesn't know.

JUDGE SIMPSON: She can testify as to whether she would take any action to keep her on.

MR. BORNSTEIN: May I strike that question?

JUDGE SIMPSON: All right.

BY MR. BORNSTEIN:

Q. If this litigation had never arisen, would you have gone to the School Board and Mr. Higginbotham and complained about Mrs. Connell's teaching ability and ask him to get her out [330] of your school? A. No, I wouldn't have done that to her for this reason. I mean for several reasons, but the main reason is that she is a human being, just like I am, and I would have tried to work with her.

Q. Your answer is no, you would not have?

JUDGE SCOTT: I would like to hear the rest of the answer, please.

JUDGE SIMPSON: All right, go ahead and make your speech.

Judge Scott wants to hear your speech. Let's hear it.

THE WITNESS: I feel this way about it. She is a human being just like I am and she needed help and I was willing to help her and I tried to explain this to Mrs. Connell when she came in as I explained to all new teachers that you must master your room. You must start mastering on the first day.

JUDGE SIMPSON: You have left this subject and gone on to another one. What you were going to explain was your reasons for not recommending that she be dropped. Had you finished that?

THE WITNESS: Maybe I did.

JUDGE SIMPSON: All right. Anything further?

THE WITNESS: He asked so many questions.

MR. BORNSTEIN: No further questions.

THE WITNESS: Good.

[331] CROSS EXAMINATION

BY MR. BUFORD:

Q. Mrs. Banks, did you put all your fourth grade problem children into the class that Mrs. Connell had? A. No, we didn't attempt to do that.

Q. You had problem children or children that you would classify as problem children in the other sections of the fourth grade class? A. Definitely so.

Q. Were there problems in the other fourth grade classes that arose in Mrs. Connell's class? A. No.

Q. What has been your experience in discipline in the class that Mrs. Connell had been teaching since the new teacher came in there? A. I have no trouble.

Q. Does the teacher send the children in to you for discipline? A. I have not had one yet.

Q. When you visited Mrs. Connell's classroom, did you do it during classroom hours? A. Yes, it has to be during classroom hours.

Q. Would you describe the condition of the room and the time of the day? A. I went to her classroom one morning. I would say it was about a quarter to 9:00, and everything was on the floor, [332] but I would just say paper, and I said this to Mrs. Connell. I said "Do you mean to tell me—"

JUDGE SIMPSON: He didn't ask what you said. He said to describe the conditions.

THE WITNESS: That is what I am trying to describe.

That is the only way I can describe it by telling what was said.

BY MR. BUFORD:

Q. Is this the normal condition that you would expect to find in a fourth grade classroom in your school? A. I had to ask her this question. "Was your room cleaned last night by the janitor;" I had to ask that question.

Q. What did she tell you? A. She said "Yes, they put it on the floor since they came in this morning." I was after the janitor for not cleaning her room.

Q. Was this a condition that you would normally expect to find in a fourth grade classroom at that hour in the morning? A. I wouldn't expect to find it in any classroom at any time of the day.

Q. Do your normally find it in any classroom at any time during the day? A. No, I don't.

Q. From your experience as a principal and a teacher, is this a condition that can be controlled by a competent teacher? [333] A. Yes, it can be controlled by a competent teacher.

Q. Has the condition in fact been controlled since Mrs. Connell has no longer been teaching there? A. Yes.

Q. In your opinion as a teacher and principal and school administrator, when were the children in that fourth grade section getting better educational opportunities, now or when Mrs. Connell had the class?

MR. BORNSTEIN: I object to this, Your Honor.

JUDGE SIMPSON: What is this in cross of, counsellor?

MR. BUFORD: This is in cross of his direct examination relative to the qualifications of this teacher, whether or not she would recommend the teacher, Your Honor.

JUDGE SIMPSON: Objection sustained.

MR. BUFORD: No further questions.

JUDGE SIMPSON: This is the last. I mean we have beat this thing to death.

MR. BORNSTEIN: Just three questions, Your Honor, very quickly.

REDIRECT EXAMINATION

BY MR. BORNSTEIN:

Q. In addition to Mrs. Connell's regular class of children, did she not also teach another class of children? A. May I explain the reason for it?

JUDGE SIMPSON: No he didn't ask the reason. He asked you [334] did she teach another class?

THE WITNESS: Yes, she did, but she—

BY MR. BORNSTEIN:

Q. Now, do you have any children sent to you from that other classroom by Mrs. Connell as disciplinary problems? A. Could I explain that?

Q. Just answer yes or no. A. No.

Q. Do you judge teacher's ability to control the classroom by the paper on the floor? Is that one of the standards of judgment? Does that bother you—would you answer that, please, Mrs. Banks? A. Yes, it bothers me to see filth on the floor.

Q. And that lead you to consider that the teacher is derelict in permitting this to happen, is that not right, Mrs. Banks? You think a good strong teacher would stop this kind of stuff going on? A. It wouldn't be there to start with.

MR. BORNSTEIN: We have no further questions.

RECROSS EXAMINATION

BY MR. BUFORD:

Q. What was the other class to which Mr. Bornstein made reference, Mrs. Banks? A. Thank you so much for asking that question.

JUDGE SIMPSON: Wait a minute. Now listen, this is not your [335] show. This is a law suit. All you are here for is to answer questions and you are not here for anything else. All right. Answer the question. What was the other class?

THE WITNESS: It was a class in math. May I explain why it was done?

JUDGE SIMPSON: He hasn't asked you that.

BY MR. BUFORD:

Q. Well, was there any particular reason she was given another class and if so, what was the reason? A. The reason was this. We have new math and I was afraid that Mrs. Connell was not up to the level of handling this new math of these fourth graders, and I asked that the fourth grade teacher, if she would exchange math and science with her. I thought that would help her more and the children would

be helped more by the math teacher going into Mrs. Connell's division and that was why I did it.

Q. Now, what was the other class that Mrs. Connell took? A. It was social studies.

Q. What grade students? A. The fourth.

Q. And how many hours a day would she be teaching the other class? A. Just one period. Then she would go back.

MR. BUFORD: No further questions.

* * *

[336] STELLA CONNELL,

having been produced and first duly sworn as the plaintiff herein testified as follows:

DIRECT EXAMINATION

BY MR. BORNSTEIN:

Q. Would you state your name, please? A. Stella Connell.

Q. Mrs. Connell, where do you live at the present time? A. 1311 South Osceola, Orlando.

Q. Are you presently a resident of Orlando, Florida? A. [337] Yes.

Q. And you are the plaintiff in this cause? A. Yes.

Q. Do you have a Degree, Bachelor of Arts Degree from a credited college or university? A. Yes.

Q. Did you apply for a teaching position with the Orange County Board of Public Instruction? A. Yes.

Q. Approximately when did you seek such employment? A. Approximately the middle of January.

Q. Now, what did you do to find a teaching job? Would you describe that to the Court please, Mrs. Connell. A. I went down to the Personnel Office of the School Board on Tampa Avenue. I received applications to fill out and I spoke to Miss McDonald who is the head of the Personnel.

Q. Did Miss McDonald talk to you at that time about the rank of teacher that you might be, and the salary that you might get? A. Yes.

Q. What did she tell you? A. She pointed out to me Rank 3 on the teacher's schedule which was the rank that paid $6,000.00 per year.

Q. Was there any discussion at that time concerning the requirement of signing a Loyalty Oath? [338] A. No.

Q. Was there any discussion whatever about any salary at a rate lower than $6,000.00 a year or any teaching rank of a substitute teacher's capacity? A. None at all.

Q. Did it come up at all in the office? A. No.

Q. What happened after your interview with Miss McDonald and where did you go then to get a job? A. Miss McDonald gave me the names of several schools that she believed had openings and I went to these schools to talk to the principals.

Q. Now, how many schools did you go to? A. I will try to remember.

Q. Was it more than one? A. Yes, about three or four, I think.

Q. Among the schools that you went to, to be interviewed by the principal, did you go to Callahan Elementary School? A. Yes.

Q. Were you interviewed by Mrs. Banks? A. Yes

Q. Can you tell us what Mrs. Banks said, among other things, in the interview, was Mrs. Banks concerned with your permanency in the position? A. Mrs. Banks asked me to promise her that if I took the [339] position that I would stay with her for the rest of the year.

Q. Did Mrs. Banks at the interview with you offer you the teacher vacancy position at Callahan? A. Yes, she did.

Q. Did you accept it at that time? A. No, I asked her—I told her that I wanted to think about it.

Q. Did you have a second interview or call her subsequently? A. I spoke with her on the phone, I think it was the next day and I accepted the position.

Q. Did Mrs. Banks at that time advise you when you would start teaching? A. We discussed it and we decided that I would start the next Monday, on the 27th of January.

Q. In other words your interview with Mrs. Banks and your telephone call of acceptance happened the week before you started teaching on January 27th? A. Yes.

Q. When you discussed the position with Mrs. Banks, was there any discussion concerning that you might be considered as a substitute teacher? A. Not at all.

Q. Was there anything discussed concerning the necessity or requirement of executing a Loyalty Oath? [340] A. No.

Q. Did you know at the time you started teaching on January 27th that you would have to sign a Florida Loyalty Oath in order to continue in your employment? A. No, sir, I didn't.

Q. When was the first time that you heard that you would have to execute a Florida Loyalty Oath? A. About ten days after I started teaching—ten days or two weeks, somewhere around there.

Q. How did it come about that you got this information? A. I was called out of my classroom and told that I should go right then to the Personnel Office to complete certain papers for my file and I went down there.

Q. You went to the School Board Office? A. Yes.

Q. Did they present certain documents for your signature? A. Yes they did.

Q. Among these documents was the Loyalty Oath which I hand you, Exhibit No. 6 at the prior hearing, was that Loyalty Oath one of the documents they gave you for signature? A. Yes.

Q. Did they also give you a teacher's Code of Ethics to be signed at that time? A. Yes, they did—I believe they did.

Q. Did you sign either of those documents at that time? [341] A. No, I did not sign either of those documents at that time.

Q. Have you signed either of those documents, either the teacher's Code of Ethics or the Loyalty Oath since? A. I signed the Code of Ethics shortly afterward and handed it to Mrs. Banks' secretary at school.

Q. But the Loyalty Oath, you did not sign that and have not signed it since? A. No.

JUDGE SIMPSON: What is the name of the person you gave the Code of Ethics?

THE WITNESS: Mrs. Anderson. I don't know the first name.

BY MR. BORNSTEIN:

Q. That is Mrs. Banks' secretary at the school? A. Yes.

Q. Have you seen that Code of Ethics since that time? A. No.

Q. Was any comments made to you after your refusal to sign the Loyalty Oath on February 7 by any school official? A. Yes.

Q. By whom? A. I spoke to Mrs. Banks about it and to Miss McDonald.

Q. Did she tell you it had to be signed in order for you to continue teaching? A. Essentially, yes.

Q. Can you recall the words that Mrs. Banks used to you? [342] A. Mrs. Banks mentioned to me at one time when I was in the office, she said "You know you have to sign the Loyalty Oath—we have to have that Loyalty Oath for you to teach here." and that was all that she said.

Q. Did you have any personal knowledge whatever that a Loyalty Oath was required before you went to the School Board Office on February 7th? A. No, none at all.

Q. In other words, you did not take a teaching position in order to attack this Loyalty Oath? A. No, I did not.

Q. Was the second Loyalty Oath that I hand you, Exhibit No. 7 from the exhibits of the prior hearing, was this Exhibit No. 7 tendered to you for signature? At a later time? A. Yes.

Q. Did you sign Exhibit No. 7? A. No, I did not.

Q. That is the modified Loyalty Oath? A. Yes.

JUDGE SIMPSON: When was that Oath tendered to you—Exhibit No. 7—when was that tendered?

THE WITNESS: Let me think—I think it was just a few days after.

JUDGE SIMPSON: A week or about a week later, the 14th or 15th?

[343] THE WITNESS: I don't believe it was more than a week. I think it was a matter of days.

BY MR. BORNSTEIN:

Q. Have you at this time obtained a teacher's certificate from the Department of Education of the State of Florida? A. Yes, I have.

Q. That was the document, a copy of which has been offered in evidence as Exhibit No. 10? A. Yes.

Q. When you first started teaching at Callahan Elementary School, did you know or were you advised that there had been a certain selection made of the students that were assigned to you? A. I was told informally that the students came from the other two sections and that it was a new section being formed.

Q. Does a teacher get certain personal records for each student that she is teaching? A. Yes.

Q. Did you get the records of the students that were assigned to your classroom? Did you get a record of all the students assigned to your class? A. I got what is called the pupil folders—I got the pupil folders available that I could get—there were certain ones that I could not obtain, maybe about ten of them.

Q. Do you know why these were not given to you? Did anyone tell [344] you why they were not given to you? A. I inquired at the office because I was anxious to have them.

Q. And what were you told? A. Well, some of the students had transferred from other schools and there was no pupil folder or that they had not gotten them and on others the pupil folders were at the school psychologist's—they had been sent there previous to my coming.

Q. About how many children were in your class? A. I believe twenty-four, somewhere in that neighborhood.

Q. Did you send a whole classroom of children to Mrs. Banks for discipline? A. No, I did not.

Q. At any time? A. No.

Q. How many children did you send to Mrs. Banks for disciplinary action at any one time or any one date, do you

recall? A. I may have sent on one occasion as many as three—I don't recall sending any more than two, but I would say three would be the most that I ever sent at one time.

O. Did Mrs. Banks or any other official ever criticize your conduct in the classroom or suggest certain changes in the technique that you were applying to these children? A. Would you repeat the question, please?

MR. BORNSTEIN: Read back the question, please.

[345] (Last question read back by court reporter.)

THE WITNESS: I don't believe so. I don't recall being criticized by Mrs. Banks.

BY MR. BORNSTEIN:

Q. Anyone ever either officially or unofficially, make any suggestions to you to do something differently from the way that you were already doing it? A. I don't believe so. I don't recall such a suggestion.

Q. Do you recall whether or not you ever received official reprimands of any kind for your classroom teaching techniques and ability? A. No, I would like to—there was one occasion on which Mrs. Banks spoke to me in her office though which I just recalled.

Q. What was that in regard to? A. On Valentine's Day my children had a Valentine Day party as the other classes were doing. It turned out I was supposed to ask Mrs. Banks first for permission, which I didn't realize, so she called me and that was kind of a reprimand. She told me that I should have permission for such functions, and I apologized, and I think that settled it between us. I don't recall any others.

Q. How long did you teach at Callahan Elementary School? A. I taught from January 27th, 1969, until the pre-trial hearing on March 17th.

[346] Q. Did you teach every day during that period? A. Yes.

Q. Did you make out report cards for these children who were in this class? A. Yes, I did.

Q. From your making of these children, did you get any indication that these children were improving in their grades? A. Yes, they seemed to improve quite a bit.

Q. Did you, as Mrs. Banks testified, teach a second class of children other than the one regularly assigned to you? A. Yes, I taught Mrs. Levine's class—one of the other fourth grade teachers.

JUDGE SIMPSON: What subject did you teach?

THE WITNESS: I taught her social study class and she taught my math class.

JUDGE SIMPSON: You just traded.

BY MR. BORNSTEIN:

Q. You two just traded classes? A. Right.

Q. Did you have any disciplinary problems or did you send any children from Mrs. Levine's class to Mrs. Banks for discipline? A. No, I didn't.

Q. Was this exchange of classes every day during the period which you taught? [347] A. Almost every day.

Q. Are you married, Mrs. Connell? A. Yes, I am.

Q. Do you have any children? A. Yes, I have one child.

Q. How old is your child? A. Fifteen months.

Q. Is your husband presently employed? A. No, he is not.

Q. Were you anticipating that you would be the bread winner for your family? A. Yes, I was anticipating that.

Q. Have you gotten any pay from the School Board since January 27th? A. No.

Q. Have you obtained other employment since you stopped teaching? A. No.

Q. Are you available and willing to resume employment as a teacher in the Orange County Board of Public Instruction, if this Court should so order? A. Yes, I am.

Q. Would you like to go back to your classroom? A. Very much.

Q. Do you enjoy teaching the children? [348] A. Yes.

Q. Do you think they enjoyed having you? A. Yes, I am sure they did.

MR. BORNSTEIN: I have no further questions, Your Honor.

MR. BUFORD: May I have just a moment please, Your Honor?

CROSS EXAMINATION

BY MR. BUFORD:

Q. Mrs. Connell, you were unwilling to sign either of the Loyalty Oaths which were tendered to you, is that correct? A. That's right.

Q. Are you willing to sign a Loyalty Oath wherein your solemnly swear or affirm that you will uphold the principles of the Constitution of the United States and of the State of Florida?

MR. BORNSTEIN: Objection, Your Honor. It is irrelevant and immaterial and this is the basis of this suit that at the time that such an oath is ordered by this Court to to be presented to Mrs. Connell for signature would be the proper time to make that determination but at this point the entire statute could be considered unconstitutional, if it is not severable, it might be considered unconstitutional as a result of the due process which is our opinion in this case, Your Honor, that when an oath is presented to an aplicant for employment at the time the determination should be made—

[349] JUDGE SIMPSON: Aren't you counsel actually asking for the prospective future relief that we order her restored to the teaching job, aren't you?

MR. BORNSTEIN: We are asking exactly that, Your Honor, but we submit that this question in our analysis and evaluation of the law in this case, we would take the position that the final order of this Court will probably not sever the statute. We think that sufficient portions of this statute will fall so that Mrs. Connell will never be forced to make this determination unless and until the Legislature enacts a new provision or in the alternative that the order of this Court will say "We find Sections 1, 2, 3, 4, and 5 are unconstitutional" and at that point the Loyalty Oath would be again raised when Mrs. Connell seeks employment

and the state seeks execution of a revised Loyalty Oath, but to put this witness on the stand—you could take her through fifty seven provisions and ask "Would you sign this, sign this, and sign the other."

JUDGE SIMPSON: This is a simple question "Would you sign one simply pledging allegiance; The Loyalty Oath of the United States and the State of Florida. It is pretty simple.

[350] MR. BORNSTEIN: May I answer on behalf of my client providing it will not—

JUDGE SIMPSON: You are not the witness and you are not under oath.

MR. BORNSTEIN: I realize that, but may I make this reservation, Your Honor, that regardless of this witness' answer that it in no way impairs our ability to claim that the entire Oath must fall.

JUDGE SIMPSON: Certainly nobody is saying that you cannot claim that; but it seems to me one view that we might take of the law might be for us to order relief and if this witness is unwilling to sign any kind of an oath—

MR. BORNSTEIN: I withdraw my objection, Your Honor.

JUDGE SIMPSON: Let's get it in the record. I don't know any reason to take several bits at this. You may answer.

THE WITNESS: I cannot answer that right now. I would have to—

JUDGE SIMPSON: Is there—do you have a reservation in your mind about taking an oath of allegiance to the United States of America, or the Constitution that we live under, the Constitution of the State of Florida, do you mind doing that?

THE WITNESS: I don't know exactly what it means. If you could explain it to me. For instance, I read hardly [351] any of the Constitution of Florida. Should I be familiar with it to take such an oath?

JUDGE SIMPSON: Well, I don't know. Maybe—it looks like you would take a chance.

THE WITNESS: I don't know that I should have to sign this Loyalty Oath.

JUDGE SIMPSON: I am going to let your answer stand. You don't know whether you would or not.

THE WITNESS: I would think about it.

JUDGE SIMPSON: I assume from what you say, also, that you would have to take the Constitution of Florida which you say you are not familiar with, and you screened it and your lawyer screened it and reached a decision on whether you would sign the oath?

THE WITNESS: No sir, I am not sure about that—I would have to think about what it would mean to sign such an oath. Exactly, for instance, whether one would have to be familiar with the actual Constitution to sign it or is this Constitution just a symbol for something else?

JUDGE SIMPSON: Just say that you support and defend the Constitution of the United States of America and the State of Florida—that is the Oath. I am curious to know if you have any objection to signing it.

THE WITNESS: I don't think I would; but I don't believe I [352] would, but I would think about it.

JUDGE SCOTT: Let me ask one question. How old are you?

THE WITNESS: Twenty-six.

JUDGE SCOTT: Thank you.

BY MR. BUFORD:

Q. Mrs. Connell, now knowing when you would be willing to take the oath to hold up the Constitution under which you seek relief, I would ask if you would be willing to take an oath that you do not mean to overthrow the Government or the State of Florida by force or violence. A. I cannot say—I would have to think about that.

MR. BUFORD: No further questions.

REDIRECT EXAMINATION

BY MR. BORNSTEIN:

Q. Mrs. Connell, have you ever read the Constitution of the United States? A. I am not sure if I read the whole thing.

Q. Have you read most of it? A. I believe so.

Q. Are you familiar with it? A. Yes.

Q. Are you familiar with 21st, 22nd, 23rd, and 25th, I guess we are up to now. A. Well, the first ones anyway. I am not sure about the latest one.

[353] Q. What would make up your mind as to whether or not you would sign an oath which reads only "I will support and defend the Constitution of the United States" and— A. And don't add the State of Florida?

Q. I will support and defend the Constitution of the United States. What would you have to do to be able to say yes or no, or can you say? A. Well, I believe—I am not sure that I believe it is constitutional, but I believe that I would sign it.

Q. Assuming the United States Supreme Court says an oath saying "I will support and defend the Constitution of the United States" is constitutional, would you then sign such an oath? A. I believe I would, yes.

Q. Do you know whether you would when you say "believe". If tomorrow morning this oath is handed to you and you are advised this is constitutional would you sign it?

MR. BUFORD: May it please the Court, I must object to counsel cross examining his own witness. She answered the question and he is attempting now to add to it or get it changed. I believe it is improper redirect examination.

JUDGE SIMPSON: Objection overruled.

JUDGE SCOTT: What was the question and answer before that?

(Last question and answer read back by court reporter.)

[354] JUDGE YOUNG: Advised by whom, Mr. Bornstein?

MR. BORNSTEIN: I withdraw that question. Let me rephrase it, Your Honor.

BY MR. BORNSTEIN:

Q. Assuming the Supreme Court of the United States has ruled that an oath which says only "I will support and defend the Constitution of the United States" is constitu-

tional, will you execute such an oath if it is given to you? A. Yes.

Q. Have you read the Constitution of the State of Florida? A. I have read the statute in question here and that is about the only thing I have read.

Q. If the provisions of the Constitution of the State of Florida were similar and not in conflict with the provisions of the United States of America and your reading confirmed to you that basically these two documents were very similar would you execute an oath which would say "I support and defend the Constitution of the State of Florida"? A. Yes.

MR. BORNSTEIN: No further questions.

RECROSS EXAMINATION

BY MR. BUFORD:

Q. Mrs. Connell, are you familiar with the contents of the 1st, 5th, and 14th Amendments to the Constitution of the United States? [355] A. Yes.

Q. And you have not hesitated in this Court to take an oath when you filed your complaint in this cause that you believe in those amendments to the Constitution to the extent that you believe the rights guaranteed you thereunder have been violated? A. Beg your pardon?

JUDGE SIMPSON: You invoked the constitution of the United States and you raised a constitutional question in bringing this suit. The question is, the 1st, 5th and 14th Amendments, isn't that right? He is pointing out the obvious it seems to me, but go ahead and answer it.

THE WITNESS: I still don't understand it.

MR. BUFORD: I withdraw it.

JUDGE SIMPSON: No question but what you invoked the 1st, the 5th and the 14th Amendment in the Federal Constitution here and asked for relief under those Amendments from this allegedly unconstitutional oath that was presented to you and that is what this law suit is about, to that extent at least you believe in the Constitution of the United States.

THE WITNESS: Yes, I certainly do.

BY MR. BUFORD:

Q. Do you recall at the last hearing in this case, Mrs. Connell you were asked by Mr. Motsinger a question and your testimony [356] a few moments ago when His Honor was questioning you about this Exhibit No. 7 which is the Loyalty Oath that the School Board asked you to sign, was that you did object to the whole thing. I didn't understand your testimony exactly.

"Answer: Yes sir, I do."

In other words, there is no particular part that you particularly dislike, you just dislike it all, is that right?

"Answer: That's right."

Now, have you changed your position this morning from the position you took then?

JUDGE SIMPSON: What page?

MR. BUFORD: Page 55, Your Honor.

JUDGE SIMPSON: Give her that and let her read the answer.

THE WITNESS: May I have a copy of the oath in front of me too? May I see a copy of the oath?

JUDGE SIMPSON: The question is have you changed your mind.

THE WITNESS: I don't believe I have, no, but I could clarify that if you want me to.

JUDGE SCOTT: I didn't hear the last part of what you said.

THE WITNESS: I haven't changed my mind.

BY MR. BUFORD:

Q. You still object to the entire oath? A. Yes sir, I do.

MR. BUFORD: No further questions.

REDIRECT EXAMINATION

[357] BY MR. BORNSTEIN:

Q. Mrs. Connell, do you object to the concept of a document entitled a Loyalty Oath? A. Yes, I do.

Q. In other words, the whole idea of swearing a loyalty to a state or country you find somewhat repulsive? A. Yes.

Q. But nevertheless, despite those feelings, you will still reaffirm your previous testimony?

MR. BUFORD: May it please the Court, I must again object to counsel leading the witness.

JUDGE SIMPSON: That is grossly leading, counsel. Reframe your question.

BY MR. BORNSTEIN:

Q. Mrs. Connell, forgetting if a document were handed to you which was not labeled at the top a Loyalty Oath and merely had support and defend the Constitution of the United States and of the State of Florida with no label on it otherwise, would you execute such an oath? A. Yes, I said I would.

MR. BORNSTEIN: No further questions.

MR. BUFORD: No further questions.

JUDGE SIMPSON: Come down.

(Witness excused.)

MR. BORNSTEIN: The plaintiff rests its case, Your Honor.

[358] MR. BUFORD: The defendant rests, Your Honor.

* * *

AFFIDAVIT

I, LeRoy L. Lamborn, residing at 1216 S.W. 2nd Avenue, Apartment 72, Gainesville, Florida 32601, being duly sworn, state that I am an Assistant Professor of Law without tenure in the University of Florida College of Law.

On Monday, October 13th, 1969, University of Florida College of Law Dean Frank E. Maloney informed the College of Law faculty at a meeting that I attended that loyalty oaths signed by approximately eighty percent of the faculty of the University of Florida were unsatisfactory because they had not been notarized. Dean Maloney fur-

ther stated that those faculty members who had not signed the loyalty oath under oath in the presence of a notary would be given loyalty oath forms before the next scheduled pay day, namely October 31st, 1969, and required to sign them under oath in the presence of a notary, and that return of the notarized completed form before October 31st is a prerequisite to any payment of the salary of the faculty members.

It is my belief that my signing of the loyalty oath in September of 1965 was not under oath in the presence of a notary and that Dean Maloney therefore intends to require me to sign the loyalty oath under oath in the presence of a notary as a precondition to payment of my salary on October 31st, and that my refusal to sign the oath will result on October 31st in the denial of salary already earned by me.

It is my further belief that I will be immediately discharged from employment by the University of Florida pursuant to Florida Statute § 876.06, a circumstance that would severely prejudice my ability to obtain employment in any other university.

/s/ LeRoy L. Lamborn

Subscribed and sworn to before me this 17th day of October, 1969.

/s/ Catharine C. O'Connell
Notary Public

My commission expires Aug. 10, 1971.

[Caption omitted in printing]

DECISION ON THE MERITS

Before SIMPSON, Circuit Judge, and YOUNG and SCOTT, District Judges.

SCOTT, District Judge:

The plaintiff in this case, a teacher in the Orange County, Florida, school system, seeks on behalf of herself and others similarly situated to have Section 876.05 of the Florida Statutes declared unconstitutional. In addition, plaintiff requests that a permanent injunction be granted restraining the defendants, their agents, officers and employees from executing or enforcing the provisions of this alleged unconstitutional section. Plaintiff alleges violation of her rights, privileges and immunities as a citizen of the United States, as secured by the First, Fifth and Fourteenth Amendments to the United States Constitution.

Jurisdiction exists under 28 U.S.C. § 1343(3), 28 U.S.C. § 2201 and 42 U.S.C. § 1983.

Plaintiff alleges that (1) the loyalty oath contained in Section 876.05 of the Florida Statutes, which all state employees are required to execute as a condition of employment, is so vague and ambiguous that it cannot be interpreted with any reasonable degree of certainty and, since a purported violation of this section can subject one to criminal prosecution under Section 876.10 of the Florida Statutes, plaintiff is denied due process of law as guaranteed by the Fifth and Fourteenth Amendments, and (2) the oath abridges plaintiff's rights to freedom of speech, assembly and association as guaranteed under the First and Fourteenth Amendments.

This case was heard by a three-judge panel pursuant to 28 U.S.C. §§ 2281, 2284.

FACTS

On or about January 16, 1969, plaintiff made application for a teaching position with the defendant Orange County school system. After interviewing the plaintiff, the principal of Callahan Elementary School, Orlando, Orange County, Florida, recommended that the plaintiff be considered for employment as a substitute teacher for the fourth grade at that school. Plaintiff was told that she could begin her teaching duties on January 27, 1969, pend-

ing routine recommendation by the superintendent and approval by the Board of Public Instruction of Orange County.

At no time prior to her employment was the plaintiff informed by the defendants of the necessity that she sign a loyalty oath; it appears, however, that the plaintiff had some knowledge of Section 876.05 of the Florida Statutes at the time she commenced employment. On February 7, 1969, plaintiff was asked to execute the oath prescribed by the statute. Plaintiff declined, informing the defendants that the particular oath had been declared unconstitutional in *Cramp v. Board of Public Instruction of Orange County*, 368 U.S. 278 (1961). Defendants later asked plaintiff to sign a version of the oath as judicially amended by *Cramp v. Board of Public Instruction*, 137 So. 2d 528 (Fla. 1962). Plaintiff also refused to sign this oath. At this point processing of plaintiff's employment papers was halted, prior to their consideration by the Board of Public Instruction of Orange County.

Defendants then informed the plaintiff that they were barred by Section 876.08 of the Florida Statutes from paying the plaintiff for any past or future services rendered by plaintiff until the oath was executed. Plaintiff related to defendants that she anticipated filing suit in the United States District Court and defendants informed plaintiff that she could remain in her teaching post without pay, pending decision on the matter.

On February 26, 1969, the plaintiff filed her complaint against the defendants seeking a hearing and determination of the federal constitutional issues before a three-judge court, a permanent injunction and an interlocutory injunction pending final determination restraining the defendants from discharging the plaintiff as a teacher in the Orange County school system or refusing to pay her salary as a teacher. After the Court denied plaintiff's motion for a temporary restraining order plaintiff was dismissed on March 18th by defendants from her substitute teaching

position. Plaintiff worked a total of seven weeks and has received no compensation from defendants for her services.

Subsequent to the denial of the plaintiff's request for a temporary restraining order, Floyd Christian, as Commissioner of Education for the State of Florida, requested and was granted leave to intervene in this action as a party defendant.

STANDING

Defendants contest the standing of the plaintiff to bring this action. They base this claim on the fact that plaintiff's application for employment was never considered by the Board of Public Instruction. Defendants contend that the plaintiff was merely a prospective employee being allowed to teach on a temporary basis pending final approval by the Board of Public Instruction. Defendants claim that plaintiff's application might have been rejected by the Board for a number of reasons based on plaintiff's qualifications as a teacher. The defendants conclude that, since plaintiff was never finally employed by the Board, she cannot now properly petition this Court for an injunction to prevent her dismissal and other appropriate relief.

Defendants' argument must fail. It is apparent from the outset that defendants' administrative agents contemplated no reason why plaintiff would not be approved by the Board of Public Instruction. Defendants admit that final approval by the Board is in reality a routine matter after a recommendation by the superintendent and that permanent teachers are normally allowed to begin their teaching activities prior to approval by the Board. Neither have defendants come forward with convincing evidence of other valid grounds upon which plaintiff's dismissal might have been predicated.

The Orange County school system is an arm of state government and its agents, officers and employees are applying state law. Plaintiff is alleging that action by these state

employees applying a state statute violates her constitutional rights. Plaintiff also claims that the application of this alleged unconstitutional statute will result in injury to her, i.e., denial of state employment and withholding of her salary for services rendered to the school system.

We shall not engage in a semantical argument concerning whether state employment is a "right" or a "privilege", but suffice it to say that the essence of due process is contained in the principle that, once the state has made available the benefit of state employment, it cannot predicate that employment on grounds which the state has no right to dictate. "The fact . . . that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution". *Torcaso v. Watkins*, 367 U.S. 488, at 495-96 (1960). "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion is patently arbitrary and discriminatory". *Wieman v. Updegraff*, 344 U.S. 183, at 192 (1952). If the statute in question is unconstitutional, then plaintiff is injured by the defendants' refusal to employ her based on her failure to execute the oath, and this injury exists quite apart from the question of whether she was a "permanent" or a "temporary" teacher. Plaintiff, therefore, has the requisite standing to bring this action. See *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961); *Gilmore v. James*, 274 F. Supp. 75 (N.D. Texas 1967), affirmed 389 U.S. 572, rehearing denied 390 U.S. 975; *Heckler v. Shepard*, 243 F. Supp. 84 (E.D. Idaho 1965).

CLASS ACTION

Plaintiff requests that she be allowed to maintain this action on behalf of all state employees who are required to execute a loyalty oath as a condition of their employment with the state. Defendants argue that plaintiff is not a proper representative of a class of state employees since her

application had not been ruled upon by the Board of Public Instruction and, therefore, plaintiff was not a full-fledged state employee.

In order for a class action to be maintained under Rule 23 of the Federal Rules of Civil Procedure, there must be an ascertainable class and a proper representative. *Hamer v. Campbell,* 358 F.2d 215 (5th Cir. 1966). Plaintiff in this case has gone through the application process for securing employment with a state-operated school system. As a condition to her employment with the school system, she was required to execute an oath in accordance with Section 876.05 of the Florida Statutes. If the section is enforced, any person seeking employment with a state agency would be required to execute such an oath as a condition of employment. Therefore, plaintiff's situation is one which is common to an ascertainable class of persons. That class is all persons seeking employment with any state agency. See *Gilmore v. James, supra.* In addition, we find that plaintiff's cause of action meets the other requirements for a class action under Rule 23(a) and (b), Federal Rules of Civil Procedure.

THE OATH

Having disposed of the procedural aspects, we move to consideration of the oath prescribed by Section 876.05 of the Florida Statutes. The section reads in full:

> "876.05 State employees; oath
>
> "All persons who now or hereafter are employed by or who now or hereafter are on the payroll of the state, or any of its departments and agencies, subdivisions, counties, cities, school boards and districts of the free public school system of the state or counties, or institutions of higher learning and all candidates for public office, are hereby required to take an oath before any person duly authorized to take acknowledgements of instruments for public record in the state in the following form:

> "I, ... , a citizen of the State of Florida and of the United States of America, and being employed by or an officer of . . . . . and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence.
>
> "And said oath shall be filed with the records of the governing official or employment governmental agency prior to the approval of any voucher for the payment of salary, expenses, or other compensation".

It is well settled that a statute will be construed as severable where it is possible to interpret its provisions as distinct and to assume that the Legislature would have enacted the provisions separately. *United States v. Jackson*, 390 U.S. 570, 585 (1967). Indeed, this very statute has been said to be severable. *Cramp v. Board of Public Instruction*, 137 So. 2d 528 (Fla. 1962).

The required oath contains a series of clauses to which the employee must swear. While all the matters contained in the oath are somewhat related, we feel that each clause has an independent basis for being contained in the oath. As such, the invalidity of certain portions of the oath does not prevent a meaningful application of the valid sections of the oath.

With this view of the statute, it is necessary to consider the separate validity of the clauses of the oath. First, we point out that this statute was the subject of prior litiga-

tion in the case of *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961) and *Cramp v. Board of Public Instruction*, 137 So. 2d 528 (Fla. 1962). In the *Cramp* case before the Supreme Court of the United States, that Court ruled that the clause "that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party" was so uncertain and vague that the state, consistent with the due process clause of the Fourteenth Amendment, could not force the employee to take the oath at the risk of subsequent prosecution for perjury or face dismissal. We are, of course, bound by this pronouncement.

We next consider the portions of the statute reading "that I am not a member of the Communist Party" and "that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or Florida by force or violence". Defendants concede that these portions of the oath may not be defensible, and they are correct. The cases are legion striking down similar language. *Whitehill v. Elkins*, 389 U.S. 54 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589 (1966); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Gilmore v. James*, 274 F. Supp. 75, affirmed 389 U.S. 572 (1968), rehearing denied 390 U.S. 975.

The defect in the statute is that it conditions employment on non-membership or, in other words, it equates disloyalty with mere membership. In *Wieman v. Updegraff*, 344 U.S. 183 (1952), the issue was a statute which required as a condition of state employment the taking of a loyalty oath that the person was not, and had not been in the preceding five years, a member of any organization listed by the Attorney General as a "communist front" or "subversive." The Supreme Court of Oklahoma had interpreted the statute as excluding persons solely on membership regardless of knowledge of the activities or purposes of the organization. In holding that the statute violated the

due process clause of the Fourteenth Amendment, the Supreme Court said:

> "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when 'each man begins to eye his neighbor as a possible enemy'. Yet under the Oklahoma Act, the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources. . . . Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process." 333 U.S. at 191.

The Supreme Court of Florida, in the case of *State v. Diez*, 97 So. 2d 105 (Fla. 1957), read the element of scienter into each of the required portions of the statute; we do not think, however, that this judicial gloss is sufficient to save these portions of the statute from constitutional defectiveness. Recent cases of the Supreme Court of the Untied States have pointed out that knowing membership cannot be restricted without a showing of a specific intent to further the unlawful aims of the organization.

Elfbrandt v. Russell, 384 U.S. 11, 16 L. ed. 2d 321, 86 S. Ct. 1238 (1966), involved an Arizona statute requiring state employees to take a loyalty oath containing provisions subjecting them to criminal penalties and discharge from employment if they subsequently became or remained a member of the Communist Party or any other organization having for one of its purposes "the violent overthrow of the government of Arizona or any of its political subdivisions, if the employee has knowledge of such unlawful purpose of the organization". The Court stated "Any lingering doubt that proscription of mere knowing member-

ship, without any showing of "specific intent" would run afoul of the Constitution was set to rest in *Apeheker v. Secretary of State*, 378 U.S. 500, 12 L. ed. 2d 992, 84 S. Ct. 1659". 384 U.S. at 16.

The Court further stated "A law which applies to membership without the specific intent to further the illegal aims of the organization infringes unnecessarily on the protected freedoms. It rests on the doctrine of guilt by association, which has no place here". 384 U.S. at 19.

In *Keyishian v. Board of Regents of New York*, 385 U.S. 589 (1966), the Court further reinforced this point, stating, "Thus mere party membership, even with the knowledge of the party's unlawful goals, cannot suffice to justify criminal punishment. [Citing *Scales v. United States*, 367 U.S. 203 (1961); *Noto v. United States*, 367 U.S. 290 (1961); *Yates v. United States*, 354 U.S. 298 (1956)]; nor may it warrant a finding of moral unfitness justifying disbarment. *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957)". 385 U.S. at 607.

The Supreme Court of the United States has reaffirmed this view in the recent case of *United States v. Robel*, 389 U.S. 258 (1967). In that case, involving the constitutionality of a section of the Subversive Activities Control Act of 1950, the Court stated:

> "The government emphasizes that the purpose of § 5(a)(1)(D) is to reduce the threat of sabotage and espionage in the Nation's defense plants. The Government's interest in such a prophylactic measure is not insubstantial. But it cannot be doubted that the means chosen to implement that governmental purpose in this instance cuts deeply into the right of association. Section 5(a)(1)(D) puts appellee to the choice of surrendering his organizational affiliation, regardless of whether his membership threatens the security of a defense facility, or giving up his job. When appellee refused to make the choice, he became subject to a possible criminal penalty and a $10,000 fine. The statute quite literally estab-

> lishes guilt by association without any need to establish that an individual's association poses the threat feared by the Government in proscribing it. The inhibiting effect of the exercise of First Amendment rights is clear. It has become axiomatic that precision of regulation must be the touchstone in an area so closely touching our most precious freedoms". 389 U.S. at 264-5.

We, therefore, hold that inclusion in the oath of the clauses "that I am not a member of the Communist Party" and "that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence" unduly infringes upon the right of free association granted by the First and Fourteenth Amendments, and those clauses must be stricken from the oath.

We now give consideration to the portion of the statute which reads "that I do not believe in the overthrow of the Government of the Untied States or of the State of Florida by force or violence". It should be noted that no cases have been cited, and the Court is not aware of any cases, in which the Supreme Court of the United States has interpreted precisely this language in a loyalty oath.

The question is what steps may the state reasonably take in order to protect itself and the institution of ordered government from infiltration by those who adhere to the principles of violent overthrow and force. We held supra that clauses equating membership with disloyalty were overbroad in application and infringed upon First and Fourteenth Amendment freedoms. However, we hold that a clause which attempts to ferret out those with personal belief in the overthrow of the government is constitutional. This clause merely attempts to keep out of state employment those who are *personally* opposed to the democratic process. Surely this is a reasonable means to a legitimate end sought by the government.

What a person believes has a central effect on the views and actions taken by that person. It would be difficult to imagine that a person believing in the overthrow of the government by force or violence, just as a person holding any belief, would not attempt to influence others around him to adopt that belief. This principle has exceptional significance when applied to school teachers. Teachers, particularly those of the lower grades, are dealing with young and very impressionable minds. Who can doubt that the teacher is one of the most important persons in the life of any youngster or that the views expressed by the teacher have great impact on the developing attitudes of the child. Moreover, the teacher, in loco parentis, is in the position of having a captive audience upon which to express his views. This is not to say that all teachers make a patent attempt to influence their students to adopt the teacher's views. The attempt, if at all, may be overt or subtle. Nevertheless, the potential for the exertion of the principles of violent overthrow as a way of life on the younger, inferior mind does exist. This potential presents grave dangers to the state's legitimate interest in educating youth and in the teaching of the principles of ordered government and the orderly process for change. The state may take reasonable steps to prevent frustration of that end. Cf. *American Communications Association v. Douds*, 339 U.S. 382 (1950).

For the same reasons we hold that the section of the oath requiring support of the Constitutions of the United States and of Florida is constitutional. Such an oath does not restrict legitimate exercise of the freedom of speech and of association. The clause in no way impermissibly restricts what the individual may believe, what he may say or to what organization he may belong. Because the clause does not "chill" these First and Fourteenth Amendment freedoms, we hold it to be a legitimate exercise of the state's interest in securing loyal employees. See *Bond v. Floyd*, 385 U.S. 116, 135-36 (1966); *Knight v. Board of Regents of Unviersity of State of New York*, 269 F. Supp. 339 (S.C. N.Y. 1967), affirmed, memorandum, 390 U.S. 36.

It is, therefore,

ORDERED AND ADJUDGED:

I. The following language of Section 876.05 of the Florida Statutes is constitutional, and the state may condition employment on the execution of an oath containing the following language:

> "I, ..., a citizen of the State of Florida and of the United States of America and being employed by or an officer of . . . . . and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence."

II. We find that all provisions of the oath prescribed by Section 876.05 of the Florida Statutes other than those stated in (I.) above are unconstitutional and the state may not condition employment on the execution of these disapproved provisions.

III. In light of our previous holding, all but the following language from Section 876.07 of the Florida Statutes is held to be without force or effect:

> "Any person having taken the oath provided for in § 876.05 and who thereafter . . . expresses any belief in . . . the overthrow of the government of the United States or of the state by violence or force. . . . shall immediately be discharged from his employment by the employing authority and his name shall be removed from the payroll, and thereafter such person shall not be permitted to receive any payment as an employee or an officer where he or she then was serving. Any person seeking to qualify for public office who fails or refuses to file an oath required by this act shall be held to have failed to qualify as a candidate for public office, and the name of such person shall not be printed on the ballot as a qualified candidate."

IV. A permanent injunction will issue from this Court restraining the defendants, their agents, officers and employees from further enforcement of Sections 876.05 and 876.07 of the Florida Statutes in a form other than that approved above.

V. Since the school term for which plaintiff's contract was to run has now ended, we deem it unnecessary for this Court to consider plaintiff's request for an interlocutory injunction restraining the defendants from dismissing her from her teaching post.

VI. We hold that plaintiff was under no obligation to execute an oath containing unconstitutional language. During the time plaintiff was actually teaching no wholly constitutional oath was offered to the plaintiff by defendants for execution. Accordingly, we feel that in equity and good conscience the plaintiff is entitled to her salary as a substitute teacher for the seven weeks of actual time she spent teaching. However we affirm the denial of the temporary restraining order by a judge of this panel to prevent the March 18, 1969, dismissal of plaintiff by the defendants. As that judge pointed out in his ruling at the conclusion of the hearing on the application for a temporary restraining order, there was no showing that the plaintiff would suffer irreparable harm by the denial of the temporary restraining order as any loss of wages could be compensated for by any damages awarded in this action.

Since plaintiff's dismissal on March 18, 1969, resulted from her refusal to execute an invalid oath, such dismissal was impermissible on such a basis alone and the plaintiff is entitled to the salary she would have received from March 18, 1969, to the end of the school term in June 1969.

Judgment shall be entered in accordance with this opinion and costs shall be assessed accordingly.

[Caption omitted in printing]

CONCURRING OPINION

YOUNG, District Judge.

I concur with Judge Scott's excellent opinion with the following explanatory remarks. I agree without reservation to Judge Scott's conclusion that the portion of the prescribed oath which reads, "that I do not believe in the overthrow of the Government of the United States or the State of Florida by force or violence" is constitutional. However, I reluctantly concur in the holding that plaintiff is entitled to her salary to June 1969 and that the portions of the prescribed oath reading, "that I am not a member of the Communist Party" and "that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or Florida by force or violence" are unconstitutional only because controlling decisions require such determinations by this Court.

(Connell v, Higginbotham - No. 68-34-Orl-Civ.)

SIMPSON, Circuit Judge, concurring in part and dissenting in part:

In major part, I concur. I think that the court has properly disposed of the question of standing and that it correctly decides that this case meets the requirements for a class action prescribed by F.R.Civ.P. Rule 23(a) and (b).

I concur also in the majority's holding that the oath prescribed by the Florida statute (F.S.A., Section 876.05) in the amended form submitted by defendants to plaintiff is unconstitutional in each of the particulars pointed out by the court.[1] But for similar reasons I would hold that

---

[1]The corresponding provisions of Sec. 876.07 of course fall with the portions of Sec. 876.05 held unconstitutional.

the provision: "that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence", is also unconstitutional.

This provision deals solely with *belief*, with what is in the mind and may remain there forever unexpressed by word or deed. It does not deal with action. It does not even deal with spoken or written words advocating overthrow of government. Surely a teacher is entitled to his or her private, secret thoughts and beliefs. I view this attempt to regulate belief unattended by word or action as more clearly a violation of constitutional rights than provisions requiring an oath that the applicant does not belong to the Communist party, or that he does not belong to an organization listed as subversive by the Attorney General.[2] In those cases belief has at least been acted upon to the extent of joining an organization.

As to the provision requiring a pledge of support of the federal and state constitutions, I am not so certain. This is an innocuous provision. Violation of it would be difficult to charge and probably impossible to prove. For reasons of vagueness alone I am inclined to believe it should be stricken also.

Of course, I agree that the plaintiff should be paid for her services to the end of the school term in June 1969, the contract period.

[Caption omitted in printing]

JUDGMENT

ORDERED AND ADJUDGED:

1. Final judgment shall be and is hereby entered in favor of the plaintiff, Stella Connell, individually, and on behalf

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[2]Cf. cases cited and quoted from by the majority opinion on pages 9, 10, 11. See further: *Brandenburg v. State of Ohio*, 1969, 395 U.S. 444, 89 S.Ct. ____, 23 L.Ed.2d 430.

of all persons similarly situated, and against the defendants, James M. Higginbotham, Superintendent of the Orange County Board of Public Instruction, Louise Breeze, Chairman of the Orange County Board of Public Instruction, and Lowell Clements, Raymond H. Bassett, William D. LaRue, Harley Thompkins, Mrs. Lee K. Davies and Stewart M. Schaffer, in accordance with the majority opinion of the Court and the opinion of Circuit Judge Simpson, concurring in part and dissenting in part.

2. The defendants, their agents, officers or employees are permanently enjoined from conditioning employment on the taking of an oath which prescribes "that I am not a member of the Communist Party" or "that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party" or "that I am not a member of any organization party which believes in or teaches, directly or indirectly, the overthrow of the United States by force or violence", which provisions are now contained in Section 876.05 of the Florida Statutes. The defendants, their agents, officers and employees are likewise permanently enjoined from enforcing Section 876.07 of the Florida Statutes in such a manner as to require the execution of the above disapproved phrases as a condition to remaining in the defendants' employ or as a condition to receiving payment from the defendants for services rendered.

3. The Court retains jurisdiction over this suit for the purpose of insuring compliance with the injunction and the order directed to defendants to pay the plaintiff the salary that has been adjudged to be due and owing.

4. The costs shall be hereafter taxed in favor of the plaintiff and against the defendants.

DONE AND ORDERED this 30th day of October, 1969.

/s/ Bryan Simpson
United States Circuit Judge

/s/ George C. Young
United States District Judge

/s/ Charles R. Scott
United States District Judge

[Caption omitted in printing]

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that STELLA CONNELL, individually, and on behalf of all persons similarly situated, Plaintiff in the above-styled cause, hereby appeals to The Supreme Court of the United States from that part of the Judgment and Order of the United States District Court for the Middle District of Florida, Orlando Division, entered October 30, 1969, wherein and whereby the Court failed to enjoin Defendants, their agents, officers or employees, from conditioning employment on the taking of an oath contained in Section 876.05 of the Florida Statutes. This Appeal is taken from that part of the Judgment and Order above-described which upheld the constitutionality of the following portions of the oath contained in Section 876.05 of the Florida Statutes, to-wit:

> ". . . I will support the Constitution of the United States and of the State of Florida . . . (and) that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence."

The Statutes under which this Appeal is taken to The Supreme Court of the United States are 28 U.S.C. §§ 2281, 2284, 1253 and 2101.

DATED at Miami, Florida, this 25 day of November, 1969.

/s/ Tobais Simon
Esquire
223 S.E. First Street
Miami, Florida 33131

Jerome J. Bornstein
Esquire
125 South Court Avenue
Orlando, Florida

[Subscription omitted in printing]

PLAINTIFF'S EXHIBIT 1

JAN 2 3 1969
JAN 1 7 1969

APPLICATION FOR INSTRUCTIONAL POSITION

Orange County Public Schools
Board of Public Instruction
P. O. Box 271 · Orlando, Florida

JAMES M. HIGGINBOTHAM, SUPERINTENDENT DATE January 16 1969

TEACHING POSITION PREFERRED: 1. English
(Subject and/or Grade Level) 2.
DATE AVAILABLE TO BEGIN Immediately

I. PERSONAL

265-64-2263
Social Security Number

Mrs. Connell Stella Morrell Levy John
Last First Middle Maiden Spouse's Name

414 Delancy Park Dr. Orlando Fla. 32789
Permanent Address City State Zip Code Phone

Same
Present Address City State Zip Code Phone

New Orleans La. May 17 1942 White
Birth Place Birth Date Race

Height 5'4½" Weight 130 Physical Impairments Good State of Health

Church Membership or Religious Preference Jewish

MARRIED ☑ SINGLE ☐ DIVORCED ☐ WIDOWED ☐ No. of Children 1 No. Dependents 2

II VALID FLORIDA CERTIFICATE Will Apply ☐ Date Applied ____ Type ____ Rank ____

Valid From ____ To ____ Subjects ____

III EDUCATIONAL AND PROFESSIONAL PREPARATION

Name and Location of College or University Attended*	Degrees & Semstrs Earned	Dates Attended	Year of Graduation	Major Subjects	Minor Subjects
Rollins College, Winter Park, Fla		1959-1961		Psychology	Liberal Arts
Hebrew University, Jerusalem, Israel		1961-1962		French Lit., Hebrew	
U. of Calif., Berkeley, Calif.	B.A.	1962-1965	1965	Philosophy	Criminology
Harvard University, Cambridge, Mass		Summer 1960		English Literature	

*Include all summer school extension work taken within the last five-year period.

IV PROFESSIONAL AND EXTRA-CURRICULAR ACTIVITY

To What Educational, Civic and Fraternal Organizations Do You Belong?
Do you participate in your professional organizations? Local ____ State ____ National ____
What Extra-Curricular Activities Can You Direct? Art
What Musical Instrument Do You Play? Piano

V. TEACHING EXPERIENCE

Year	Name and Location of School	Grades or Subjects Taught	No. Mos.	Mo. Salary	Immediate Supervisor and Address

VI. REFERENCES Please give at least three persons who can professionally estimate your ability as a teacher. If you have had teaching experience, please give the names of your last two employers (principals) first.

Name	Title	Address & Zip Code
✓ Dr. Irvin Stock	Prof of English	English Dept U of Mass
✓ Dr. Roswell Angier	Prof of Literature	Dept of Comp Lit Boston U
✓ Dr. William Jensith	Prof of Art	Franklin Pierce College Rindge, N.H.

[PLAINTIFF'S EXHIBIT 1 - continued]

... OR MILITARY - (List in chronological order.)

Name of Firm, Institution, Association or Organization	City, Town and State	Period of Service (Months)	Type of Work	Reason for leaving this position
Citylights Publishers	San Francisco Calif	From 1962 To Sept 1964	editorial asst.	left California
		From 19 To 19		
		From 19 To 19		
		From 19 To 19		
		From 19 To 19		
		From 19 To 19		

VIII. MILITARY EXPERIENCE

1. Branch of Service _____

2. Dates of Service _____ to _____

3. Rate or rank when separated _____

IX. PERSONAL STATEMENT (Provide brief statement on reason for applying: i.e., personal preference, husband's job necessitating move, relatives or family here, etc.) personal preference

X. I certify that the information supplied above (Items I-IX) is accurate to the best of my knowledge.

Stella Connell
(Signature)

INFORMATION FOR APPLICANTS

We operate on a referral system. Your application will be placed on file in our central office. Principals in need of teachers will consult the application file and consider applications from this file. When your application has been processed, information will be forwarded to the principal who has a vacancy for which you qualify since the principal is directly responsible for the instructional program in his school.

For additional information, please use a separate sheet. A description of any original work, either in education or related fields, will be helpful.

An interview is always desirable, in fact, is frequently required. However, candidates are advised to communicate with this office before going to any considerable expenditure of time or money in seeking an interview. The request to come for an interview in no way implies that the applicant will be employed.

The sending of an application blank does not imply that the candidate is under consideration for immediate appointment. Applicants should expect to receive information concerning their application only in case they are being seriously considered for an appointment. Applications are kept on file one year.

EDUCATIONAL REQUIREMENTS

The minimum training requirement for appointment to a teaching position is the Bachelor's Degree.

Certificates issued in other States are not recognized in Florida.

If you do not hold a Florida Certificate, or wish additional certificate information, please communicate with the State Department of Education, Tallahassee, Florida.

Classification of Certificates with Ranks: Advanced Post Graduate I, Special Post Graduate I-A, Post Graduate II, Graduate III, Provisional Graduate III, Temporary (I, II, III)

Our salary schedule is based on the rank of your highest valid Florida Certificate. Pending receipt of a higher rank Florida Certificate, teachers are paid on a rank III basis. Upon receipt of the higher rank certificate, salary will be adjusted retroactive to the beginning of the current school term.

[PLAINTIFF'S EXHIBIT 1 - continued]

THE BOARD OF PUBLIC INSTRUCTION
FOR THE COUNTY OF ORANGE

JAMES M. [illegible]NBOTHAM
Secretary and Superintendent

P. O. BOX 271
ORLANDO, FLORIDA

PERSONNEL DEPARTMENT

Date January 17, 1969

Dr. Irvin Stock
University of Massachusetts
Amherst, Massachusetts
Boston,

Stella Morrell Levy Connell has applied for a position in the Orange County School System and has given your name as a reference. I would greatly appreciate your estimate of (him) (her) as a teacher. Any information you may furnish will be treated as strictly confidential. Please check below, in the columns, the items most applicable to the above named person. Please return the completed form in the envelope which you will find enclosed.

	Excellent	Very Good	Good	Average	Fair	Unknown	REMARKS
Character	X						
Scholarship		X					
Personality	X						
Industry	X						
Health and Vigor	X						
Common Sense	X						
Cooperation	X						
Leadership		X					
Promise of Success	X						
General Rank as Teacher						X	

Use this space for additional remarks:

I think Mrs Connell will make a first rate teacher. Mr irresponsible kid from wrong side of tracks. Mrs Connell will work with them excellent in all two categories above.

If a vacancy existed in your school for which the applicant could qualify, would you recommend him for employment?

Yes X No

Signed Irvin Stock

Position Chairman, Dept. of English
Supv. of English
Univ. Prof.

[PLAINTIFF'S EXHIBIT 1 - continued]

THE BOARD OF PUBLIC INSTRUCTION
FOR THE COUNTY OF ORANGE

JAMES M. HIGGINBOTHAM
Secretary and Superintendent

P. O. BOX 271
ORLANDO, FLORIDA

PERSONNEL DEPARTMENT

Date January 17, 1969

Dr. William Jensch
Franklin Pierce College
Rindge, New Hampshire

Stella Morrell Levy Connell has applied for a position in the Orange County School System and has given your name as a reference. I would greatly appreciate your estimate of (him) (her) as a teacher. Any information you may furnish will be treated as strictly confidential. Please check below, in the columns, the items most applicable to the above named person. Please return the completed form in the envelope which you will find enclosed.

	Excellent	Very Good	Good	Average	Fair	Unknown	REMARKS
Character	✓						
Scholarship	✓						
Personality	✓						
Industry		✓					
Health and Vigor		✓					
Common Sense	✓						
Cooperation	✓						
Leadership		✓					
Promise of Success		✓					
General Rank as Teacher		✓					

Use this space for additional remarks:

Stella is a very intelligent and patient girl and should make a good teacher.

If a vacancy existed in your school for which the applicant could qualify, would you recommend him for employment?

Yes ____ No ____

Signed William P Jensch

Position Faculty - Franklin Pierce College

PLAINTIFF'S EXHIBIT 2

ORANGE COUNTY BOARD of PUBLIC INSTRUCTION

JAMES M. HIGGINBOTHAM, COUNTY SUPERINTENDENT

Orlando, Florida

Nomination for Appointment of Teacher

School Callahan elementary Social Security No. 265-66-0053 Sex F Race White

Name of Person Nominated Stella Levy Connell

Years Exp. 0 College Degree or Degrees A B

Type of Certificate and Subjects listed Thereon

Teacher Replaces Nominated By [signature] Principal

Will Teach Grade 4th

And/or Subject Date January 28, 1969

PLAINTIFF'S EXHIBIT 3

STELLA L. CONNELL
CALLAHAN ELEMENTARY SCHOOL

Started January 27, 1969 through March 14, 1969

5 days - January
20 days - February
10 days - March
35 days

$6000.00 ÷ 196 days = 30.6122 per day
Rank 3 Certificate 30.6122 x 35 = $1,071.43

We do not have a valid teaching certificate on file.

Substitute rate of pay

No certificate - daily rate 12.00 x 35 days $420.00
Rank 4 or 5 certificate - daily rate 14.00 x 35 days $490.00
Rank 3 certificate - daily rate 22.00 x 35 days $770.00

January 27, 1969 through June 20, 1969

96/196 @ 30.6122 = 2938.77
96 days @ 12.00 = 1152.00
96 days @ 14.00 = 1344.00
96 days @ 22.00 = 2112.00

PLAINTIFF'S EXHIBIT 4

FORM W-4 (Rev. Jan. 1967)
U. S. Treasury Department
Internal Revenue Service

EMPLOYEE'S WITHHOLDING EXEMPTION CERTIFICATE

SCH. 1 Orl.

Type or print full name Stella Levy Connell Social Security Number 265-66-0053

Home address 414 Delaney Pk. Dr. City Orlando State Fla. ZIP code 32806

EMPLOYEE:
File this form with your employer. Otherwise, he must withhold U.S. Income tax from your wages without exemption.

EMPLOYER:
Keep this certificate with your records. If the employee is believed to have claimed too many exemptions, the District Director should be so advised.

HOW TO CLAIM YOUR WITHHOLDING EXEMPTIONS

1. If SINGLE (or if married and wish withholding as single person), write "1." If you claim no exemptions, write "0" . . . .
2. If MARRIED, one exemption each is allowable for husband and wife if not claimed on another certificate.
   (a) If you claim both of these exemptions, write "2"; (b) If you claim one of these exemptions, write "1"; (c) If you claim neither of these exemptions, write "0" 2
3. Exemptions for age and blindness (applicable only to you and your wife but not to dependents):
   (a) If you or your wife will be 65 years of age or older at the end of the year, and you claim this exemption, write "1"; if both will be 65 or older, and you claim both of these exemptions, write "2" . . . .
   (b) If you or your wife are blind, and you claim this exemption, write "1"; if both are blind, and you claim both of these exemptions, write "2" . . . . . .
4. If you claim exemptions for one or more dependents, write the number of such exemptions. (Do not claim exemption for a dependent unless you are qualified under Instruction 4 on other side.) 1
5. If you claim additional withholding allowances for itemized deductions fill out and attach Schedule A (Form W-4), and enter the number of allowances claimed (if claimed file new Form W-4 each year) . . . . . .
6. Add the exemptions and allowances (if any) which you have claimed above, and write total 3
7. Additional withholding per pay period under agreement with employer. (See Instruction 1.) . . . . . $

I CERTIFY that the number of withholding exemptions claimed on this certificate does not exceed the number to which I am entitled.

(Date) Feb. 11, 1967 (Signed) Stella Connell

N44000

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PLAINTIFF'S EXHIBIT 5

STATE OF FLORIDA
DEPARTMENT OF EDUCATION
OFFICIAL RECEIPT AND ACKNOWLEDGEMENT

ORIGINAL RECEIPT

THIS ACKNOWLEDGES YOUR APPLICATION AND IS YOUR OFFICIAL RECEIPT FOR PAYMENT OF FEES AS INDICATED BELOW.

DATE

PLEASE REFER TO THIS YOUR DEPT. OF EDUCATION NUMBER IN ALL TYPES

METHOD OF PAY

1 - CASH
2 - CASHIER'S CHECK
3 - MONEY ORDER
4 - PERSONAL CHECK

AMT. OF PAY

TYPE OF REQUEST

1 - REGULAR CERTIFICATION
2 - DUPLICATE CERTIFICATION
3 - REISSUED TEMPORARY
5 - VOCATIONAL CERTIFICATION
6 - SUBSTITUTE CERTIFICATION
7 - ADULT EDUCATION
8 - OTHER SERVICES

OTE: Further processing of your application is pending receipt of items listed below or transcripts from the following:

APPLICANT COPY 3

John S. Staples
Director, Teacher Certification

PLAINTIFF'S EXHIBIT 6

LOYALTY OATH

As Required by Chapter 25046 (No. 50) Acts of 1949

I, _____

a citizen of the State of Florida and of the United States of America, and being employed by or an officer of _____

_____

and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the government of the United States or of Florida by force or violence.

_____

State of Florida
County of _____

Personally appeared before me _____ who states _____ has read the foregoing oath and is familiar with what it says and that _____ signed it freely and voluntarily, and in my presence.

SWORN TO before me this _____ day of _____ A.D. 19___.

_____

PLAINTIFF'S EXHIBIT 7

L O Y A L T Y O A T H

As Required by Chapter 25046 (No. 50) Acts of 1949

"I, . . . a citizen of the State of Florida and of the United States of America, and being employed by or an officer of . . . and a recipient of public funds as such employee or officer do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence."

_____

STATE OF FLORIDA)
ss:
COUNGY OF)

Personally appeared before me_____ _____who states _____has read the foregoing oath and is familiar with what it says and that_____signed it freely and voluntarily, and in my presence.

SWORN TO and subscribed to and before me this_____day of_____,A.D. 196____.

_____
NOTARY PUBLIC

MY COMMISSION EXPIRES:

_____

(NOTARY SEAL)

PLAINTIFF'S EXHIBIT 8

TO: APPLICANT

FROM: FLORIDA TEACHER CERTIFICATION OFFICE

We have received your application for a certificate. Enclosed is your "Official Receipt and Acknowledgement." This is a receipt for your $10.00 fee and assurance that a certificate can be issued. It carries the STATE DEPARTMENT OF EDUCATION NUMBER which will appear on your certificate when it is issued and the Minimum Foundation Program (MFP) salary rank of the certificate.

The state adopted Annual Contract of Employment for Instructional and Administrative or Supervisory Personnel of Public Schools states, "that the Teacher will be legally qualified to teach in the State of Florida upon issuance of a Florida Teacher's Certificate for which application has been duly made as evidenced by the official receipt and acknowledgement recorded in the Office of the County Superintendent of Public Instruction, bearing State Department of Education file No. _____." Therefore, the official receipt and acknowledgement may be honored by your county for payroll purposes for at least the first two months during which you are employed.

Applications for certificates are processed in the order in which the completed applications are received. Your certificate will be issued in its turn as soon as possible. We request that you wait at least 60 days after receiving your "Official Receipt and Acknowledgement" before writing or contacting us for information about status of your application.

We shall be grateful for your cooperation.

PLAINTIFF'S EXHIBIT 9

LAW OFFICES OF

JOHNSON, MOTSINGER, TRISMEN AND SHARP

100 EAST ROBINSON STREET
THE JOHNSON BUILDING
ORLANDO, FLORIDA 32801
TELEPHONE (305) 841-7350

213 WEST COMSTOCK AVENUE
POST OFFICE BOX 1680
WINTER PARK, FLORIDA 32789
TELEPHONE (305) 647-8851

GEORGE W. JOHNSON
JOHN MOTSINGER, JR.
RICHARD F. TRISMEN
JOEL M. SHARP, JR.
WINIFRED JOHNSON SHARP
CHARLES R. FAWSETT
GEORGE W. JOHNSON, III

February 14, 1969

IN REPLY ADDRESS FIRM AT ORLANDO OFFICE

Jerome J. Bornstein, Esquire
125 South Court Avenue
Orlando, Florida

Re: Oath Required by Board of Public Instruction

Dear Mr. Bornstein:

Enclosed is a copy of the form of oath that your niece, Mrs. Sylvia Connell, will be asked to sign prior to finalization of her employment, as a condition precedent to contracting with Mrs. Connell the Board must have on file a copy of her sworn oath to comply with the provisions of Florida Statutes 876.05 through .10.

I regret that the contents of the oath originally given your niece apparently tracked the Statute instead of the Statute as judicially amended. I believe that you will find that the oath enclosed now complies with the Florida Supreme Court Opinion in Cramp v. The Board of Public Instruction of Orange County, 137 So. (2d) 828 (Fla. 1962).

If you have any question or further objection to the oath, please contact me at your convenience.

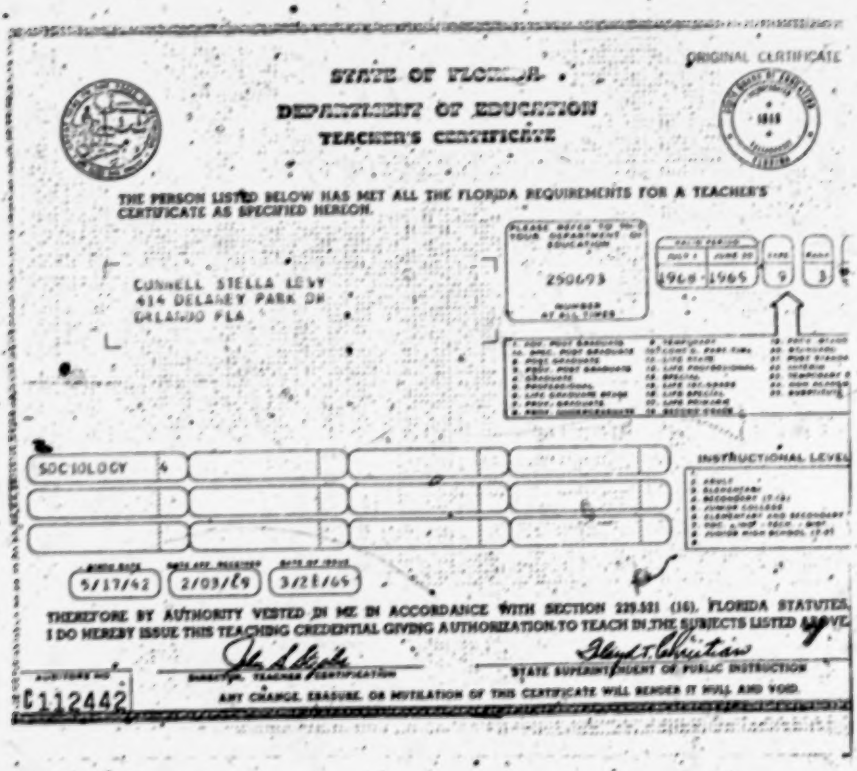
Very truly yours,

George W. Johnson, III

GWJ3/e
enclosure

cc: Mr. Robert Cascaddan

PLAINTIFF'S EXHIBIT 10



STATE OF FLORIDA

DEPARTMENT OF EDUCATION

TEACHER'S CERTIFICATE

ORIGINAL CERTIFICATE

THE PERSON LISTED BELOW HAS MET ALL THE FLORIDA REQUIREMENTS FOR A TEACHER'S CERTIFICATE AS SPECIFIED HEREON.

CONNELL STELLA LEVY
414 DELANEY PARK DR
ORLANDO FLA

250693

1968 1969 9 3

SOCIOLOGY 4

INSTRUCTIONAL LEVEL

5/17/42 2/03/69 3/28/69

THEREFORE BY AUTHORITY VESTED IN ME IN ACCORDANCE WITH SECTION 229.531 (16), FLORIDA STATUTES, I DO HEREBY ISSUE THIS TEACHING CREDENTIAL GIVING AUTHORIZATION TO TEACH IN THE SUBJECTS LISTED ABOVE.

DIRECTOR, TEACHER CERTIFICATION

STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

AUDITOR'S NO. C112442

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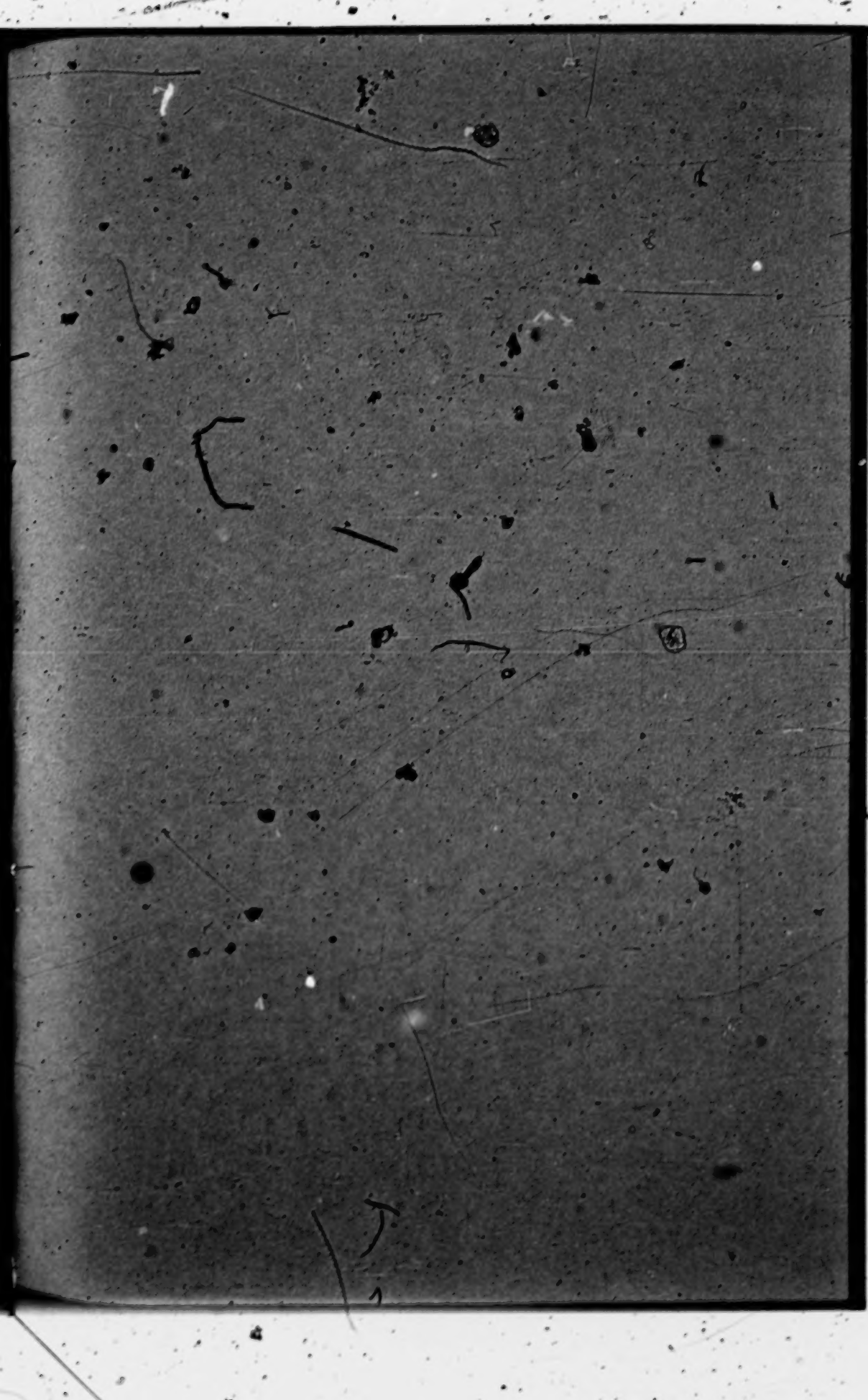

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 79

STELLA CONNELL,

Appellant,

—v.—

JAMES M. HIGGINBOTHAM, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

JURISDICTIONAL STATEMENT

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IN THE

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OCTOBER TERM, 1969

No. .....

STELLA CONNELL,

Appellant,

—v.—

JAMES M. HIGGINBOTHAM, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

JURISDICTIONAL STATEMENT

Appellant appeals, on behalf of herself and the class she represents, from so much of the Judgment and Order of a three-judge District Court for the Middle District of Florida, dated October 30, 1969, as upholds the constitutionality of portions of the Florida loyalty statute and of an oath, required pursuant to it as a condition of employment by the State of Florida, and as denies appellant's prayer that appellees be permanently enjoined from enforcing said statute and requiring said oath.

Opinions and Order Below

The opinions and order of the three-judge District Court are not reported. Copies of the opinions and order are contained in the Appendix, *infra*, pp. 1a-21a.

Jurisdiction

This class suit was brought under 28 U.S.C. §§1331, 1343, 2201, 2202, 2281 and 2284, Rule 23 of the Federal Rules of Civil Procedure, and the First, Fifth and Fourteenth Amendments to the Constitution of the United States to declare unconstitutional and enjoin enforcement of the provisions of Florida Statutes §§876.05-876.10 and of the loyalty oaths required pursuant to them as a condition of public employment. The order of the three-judge District Court denying some of the appellant's prayers for relief was dated October 30, 1969, and notice of appeal was filed in the District Court for the Middle District of Florida on November 25, 1969. The jurisdiction of the Supreme Court to review this decision and order by direct appeal is conferred by 28 U.S.C. §1253. The following decisions, among many, sustain the jurisdiction of the Supreme Court to review the judgment and order on direct appeal in this case: *Palmetto Fire Ins. Co.* v. *Conn,* 272 U.S. 295, 305; *Florida Lime and Avocado Growers, Inc.* v. *Jacobsen,* 362 U.S. 73, 85; *Shelton* v. *Tucker,* 364 U.S. 479; *Baggett* v. *Bullitt,* 377 U.S. 360; *Flast* v. *Cohen,* 392 U.S. 83.

Statutes and Oaths Involved

Involved here are §§876.05-876.10 of Fla. Stats. Ann. and the various loyalty oaths upon which appellant's employment as a school teacher was conditioned. The statutory provisions and oaths to which she was subjected are set forth in the Appendix, *infra,* pp. 22a-26a.

Questions Presented

1. Do the portions of the Florida loyalty statute and oath that were validated by the District Court violate, on their faces and as applied, the freedoms of expression, belief, and privacy guaranteed by the First and Fourteenth Amendments?

2. Do the portions of the Florida loyalty statute and oath that were validated by the District Court deny, on their faces and as applied, due process of law under the Fourteenth Amendment because they are unduly vague and provide no opportunity for clarification?

3. Are the provisions of the Florida loyalty statute and oath nonseverable and therefore unconstitutional in their entirety?

Statement of the Case

The appellant is a citizen of the United States and resides in Orange County, Florida. The appellees are the Superintendent of Public Instruction of Orange County, Florida and the Chairman and members of the Board of Public Instruction of Orange County, Florida. After the Complaint was filed, the Commissioner of Education of the State of Florida was granted leave to intervene as a party defendant and presently is an appellee before this Court.

On or about January 16, 1969, appellant made application for a teaching position with the Orange County school system (App., *infra,* p. 2a). She was interviewed by the principal of Callahan Elementary School, Orlando, Orange County (App., *infra,* p. 3a). On or about January 27, 1969 she was employed as a classroom teacher in the Fourth

Grade of that school by the appellees and their agents (App., *infra*, p. 3a). The District Court found that her employment was as a substitute teacher subject to final approval (App., *infra*, p. 3a). The appellant contends that this was a temporary status, required of all new teaching personnel, and she was assured by the appellee's agents that shortly she would become a permanent teacher for the balance of the 1968-69 school year.

At no time prior to her employment was the appellant informed by the appellees that execution of a loyalty oath was a condition of her employment and payment by the appellees (App., *infra*, p. 3a). The District Court did find, however, that she had some knowledge of the applicable statute at the time she commenced the employment (App., *infra*, p. 3a). On February 7, 1969, the appellees notified appellant that she would be required to execute a loyalty oath as a condition of continuing her employment (App., *infra*, p. 3a). Specifically she was asked to declare:

> "I, ..., a citizen of the State of Florida and of the United States of America, and being employed by or an officer of .... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or in-

directly, the overthrow of the Government of the United States or of Florida by force or violence." App., *infra*, pp. 3a, 8a, 25a.

The District Court found that the oath was identical to the one declared unconstitutional by this Court nine years ago in a case involving the precise statute at issue in the instant case and many of the same parties-defendant in their official capacities. *Cramp* v. *Board of Public Instruction of Orange County*, 368 U.S. 278 (App., *infra*, pp. 8a-9a). (A facsimile of the oath is set forth in the Appendix, *infra* at p. 25a). The appellant declined to execute the oath on the ground that it was invalid and unconstitutional and had been declared so by this Court (App., *infra*, p. 3a). The appellees then asked appellant to sign a version of the oath as judicially amended by the Supreme Court of Florida on remand from this Court (App., *infra*, p. 3a). *Cramp* v. *Board of Public Instruction of Orange County*, 137 So.2d 828 (Fla. 1962).[1] The appellant refused to sign the modified oath, and the District Court found that processing of her employment papers was halted before final consideration by the Board of Public Instruction (App., *infra*, p. 3a).

The appellees informed the appellant that they were barred by Section 876.08 of Fla. Stats. Ann. from paying

[1] On remand, the Supreme Court of Florida ruled that only the phrase "that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party" was constitutionally infirm under this Court's decision. The phrase was declared severable both from the statute and from the oath. Thus the second oath required of appellant was identical to the first one, but for the absence of the void phrase. Notably, the first oath was on a mimeographed "official" form; the second was typed from that master, eliminating the guilty phrase. A facsimile of the second oath is found in the Appendix, *infra*, p. 26a.

her for past or future services until the oath was executed (App., *infra*, p. 3a). After they were informed by the appellant that she anticipated filing suit in the United States District Court, the appellees permitted the appellant to remain in her teaching post without pay, pending judicial decision on the matter (App., *infra*, p. 3a).

On February 26, 1969, the appellant filed her complaint against the appellees. After the District Court denied her motion for a temporary restraining order she was dismissed by the defendants from her teaching position on March 18, 1969 (App., *infra*, pp. 3a-4a).

On October 30, 1969 the District Court entered its Judgment, in favor of the appellant individually and on behalf of all persons similarly situated. It ruled, *inter alia*, that: (1) Under Rule 23 of the Federal Rules of Civil Procedure, appellant had standing to maintain a class action "on behalf of all state employees who are required to execute a loyalty oath as a condition of their employment with the state" (App., *infra*, p. 6a). (2) The phrase in the statute and first loyalty oath, "I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party," had been declared unconstitutional by this Court in 1961 (App., *infra*, p. 9a). (3) The phrases in the statute and the loyalty oaths, "that I am not a member of the Communist Party" and "that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence," unduly infringed "upon the right of free association granted by the First and Fourteenth Amendments . . . " (App., *infra*, p. 12a). (4) The phrases in the statute and the loyalty

oaths, "that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence" and "I will support the Constitution of the United States and of the State of Florida," are not themselves unconstitutional (App., *infra*, pp. 12a-14a). (5) Under Florida and federal law, the unconstitutional portions of the statute and oath are severable; consequently, the State of Florida still may require a loyalty oath as a condition of public employment (App., *infra*, pp. 8a, 14a). (6) Since the appellant was discharged solely because she declined to execute an oath containing unconstitutional language, she was entitled to her salary as a substitute teacher for the seven weeks of actual time she spent teaching and for the salary she would have received from March 18, 1969, to the end of the school term in June 1969 (App., *infra*, p. 16a).

The defective portions of the statute and oath were declared unconstitutional (App., *infra*, p. 15a). The appellees were permanently enjoined from conditioning employment on the taking of an oath including the language declared unconstitutional and "from enforcing §876.07 of [Fla. Stats. Ann.] in such a manner as to require the execution of the above disapproved phrases as a condition to remaining in the defendants' employ or as a condition to receiving payment from the defendants for services rendered" (App., *infra*, p. 20a). Finally, jurisdiction was retained over the suit "for the purpose of insuring compliance with the injunction and the order directed to the defendants to pay the plaintiff the salary that has been adjudged to be due and owing" (App., *infra*, p. 20a). Circuit Judge Simpson, who concurred in part and dissented in part, would have declared the two remaining phrases in the statute and

oaths unconstitutional under the First and Fourteenth Amendments (App., *infra,* pp. 17a-18a).

On November 25, 1969, Notice of Appeal was filed by the Appellant, appealing from the portions of the District Court's decision and Order sustaining the constitutionality of the two remaining phrases in the statute and loyalty oath, declining to enjoin the appellees from enforcing these and any other applicable portions of the statute, and declining to declare §§876.05-876.10 unconstitutional in their entirety. The appellees have not filed a cross appeal.

Subsequent to the decision and Order of the District Court, employees of the University of Florida were required to execute loyalty oaths in the form presumptively sustained by the District Court in the instant case. Three employees, two teachers and one library clerk, who declined to execute the revised oath were discharged in mid-year pursuant to §876.06 of Fla. Stats. Ann. They have filed a new class action in the Court below. *Adams* v. *Board of Regents of the State of Florida,* Civ. Action No. 69-240, M.D. Fla. A stipulation which was executed in that case on December 17, 1969 is set out in the Appendix, *infra,* pp. 27a-29a. Local counsel in the instant case is also lead counsel in the new case.

The Questions Are Substantial

The statutory and oath requirements left standing by the District Court raise fundamental questions under the First and Fourteenth Amendments. We believe that these questions are resolved by well established principles enunciated by this Court, according to which the provisions at issue unconstitutionally limit speech and belief of public employees, notably teachers, in the State of Florida. Nevertheless this appeal is an appropriate one for plenary review by the Court. First, this is the first modern occasion for the Court to consider language in an oath and statute cast explicitly in terms of the oath taker's political *beliefs* rather than his advocacy or organizational membership. Second, this case presents the Court's first opportunity to pass on the constitutionality of a so-called affirmative loyalty oath in tandem with numerous so-called negative loyalty oaths, rather than in isolation and therefore presumptively an oath of office or a mere symbolic declaration of fidelity. *Compare, Richardson* v. *Cole,* 300 F. Supp. 1321 (D. Mass. 1969); *Pedlosky* v. *Massachusetts Institute of Technology,* 352 Mass. 127, 224 N.E.2d 414 (1967), *with, Bond* v. *Floyd,* 385 U.S. 116, 135-36; *Knight* v. *Board of Regents of University of State of New York,* 269 F. Supp. 339 (S.D. N.Y. 1967), *aff'd mem.,* 390 U.S. 36; *Hosack* v. *Smiley,* 276 F. Supp. 876 (D. Colo. 1967), *aff'd mem.,* 390 U.S. 744. Third, plenary review is necessary to finally put to rest controversy over the Florida law and practice which were first reviewed and voided (at least in part) almost ten years ago in *Cramp* v. *Board of Public Instruction of Orange County,* 368 U.S. 278.

I.

On their face and as applied, the portions of the statute and oath declared not unconstitutional by the Court below, violate the First and Fourteenth Amendments' protection of the freedom of expression, belief, and privacy.

The District Court expressly ordered and adjudged that: "The following language of Section 876.05 of [Fla. Stats. Ann.] is constitutional, and the state may condition employment on the execution of an oath containing the following language:

> 'I, ..., a citizen of the State of Florida and of the United States of America and being employed by or an officer of ..... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; and that I do not believe in the overthrow of the government of the United States or of the State of Florida by force or violence.'" App., *infra,* pp. 14a-15a.

As a direct result of this ruling, the appellant and members of the class she represents are subject to precisely this oath as a condition precedent to public employment. See Stipulation, App., *infra,* pp. 27a-29a.

A. By its very terms, the phrase "I do not believe in the overthrow of the government of the United States or

of the State of Florida by force or violence" constitutes a negative loyalty oath. Beginning with the 1961 decision in *Cramp*, the predecessor of this case, each such test oath to come before this Court has been found to be in violation of the First Amendment. See *Cramp* v. *Board of Public Instruction of Orange County*, 368 U.S. 278; *Baggett* v. *Bullitt*, 377 U.S. 360; *Elfbrandt* v. *Russell*, 384 U.S. 11; *Keyishian* v. *Board of Regents*, 385 U.S. 589; *Whitehill* v. *Elkins*, 389 U.S. 54; *James* v. *Gilmore*, 389 U.S. 572, *affirming per curiam*, 274 F. Supp. 75 (N.D. Tex. 1967). Further, the decision of the Court below is the only one, since this Court's ruling in the *Whitehill* case, by which a state or inferior federal court upheld a negative loyalty oath (or authorizing statute) for public employees. *Compare, e.g., Vogel* v. *County of Los Angeles*, 64 Cal. Rptr. 409, 434 P.2d 961 (1967); *Whitehill* v. *Elkins*, 287 F. Supp. 61 (D. Md. 1968); *Haskett* v. *Washington*, 294 F. Supp. 912 (D.D.C. 1968); *Stewart* v. *Washington*, 301 F. Supp. 610 (D.D.C. 1969); *Richardson* v. *Cole*, 300 F. Supp. 1321 (D. Mass. 1969); *Thalberg* v. *Board of Trustees of the University of Illinois*, —— F. Supp. —— (No. 68 C 211 & 212 N.D. Ill. June 13, 1969). Arguably, all such negative oaths, regardless of formulation, offend the First and Fourteenth Amendments' freedoms of expression, belief, and privacy.

The District Court's arguments, and the decision they support, are grossly inconsistent with the governing pronouncements of this Court on the meaning and scope of the First Amendment's freedom of expression and belief. The District Court proceeded from the notion that the State is free to limit employment opportunities on the basis of the putative *beliefs* and only the putative *beliefs* of one who

declines to execute a loyalty oath. Such an approach offends the most fundamental assumptions of a free society. It also flies in the face of all the loyalty oath, internal security, and freedom of speech decisions rendered by this Court at least since 1961. As Judge Simpson noted in dissent below:

> "This provision deals solely with *belief*, with what is in the mind and may remain there forever unexpressed by word or deed. It does not deal with action. It does not even deal with spoken or written words advocating overthrow of government. Surely a teacher is entitled to his or her private, secret thoughts and beliefs. I view this attempt to regulate belief unattended by word or action as more clearly a violation of constitutional rights than provisions requiring an oath that the applicant does not belong to the Communist party, or that he does not belong to an organization listed as subversive by the Attorney General. In those cases belief has at least been acted upon to the extent of joining an organization." App., *infra*, p. 18a.

Judge Simpson's analysis is confirmed by this Court's most recent decisions on freedom of speech, which make it abundantly clear that even spirited advocacy of unlawful activity is immune from state sanction unless it constitutes "incitement to imminent lawless action." *Brandenburg* v. *Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 1830. See also, *e.g.*, *Street* v. *New York*, 394 U.S. 576; *Watts* v. *United States*, 394 U.S. 705; *United States* v. *Robel*, 389 U.S. 258.

Obviously, mere belief, as yet unwedded to any action not even speech, deserves even greater protection than

advocacy. Numerous pronouncements by the Court and its members make it clear that the "First Amendment gives freedom of mind the same security as freedom of conscience." *Thomas* v. *Collins*, 323 U.S. 516, 531. "[T]he domains of conscience and belief," Justice Douglas has said "have been set aside and protected from government intrusion . . . . *What a man thinks is of no concern to government.*" *Speiser* v. *Randall*, 357 U.S. 513, 536 (concurring opinion) (emphasis added). See also, *Sweezy* v. *New Hampshire*, 354 U.S. 234, 266 (Frankfurter, J., concurring). In *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 412, the Court recognized the constitutional requirement that "one be permitted to believe what he will," and Mr. Justice Black, in dissenting, noted that "[i]ndividual freedom and governmental thought-probing cannot live together." *Id.* at 446. See also, *Watkins* v. *United States*, 354 U.S. 178, 198; *United States* v. *Rumely*, 345 U.S. 41.

The notion that the First Amendment reserved certain areas free from governmental inquiry was well-established long before the now famous exposition of the right of privacy in *Griswold* v. *Connecticut*, 381 U.S. 479. Articulated most forcefully by Justice Brandeis, dissenting in *Olmstead* v. *United States*, 277 U.S. 438, 478, the constitutional right at issue was simply "the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." The framers of the Constitution, he said, had "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations." *Ibid.* See also *Stanley* v. *Georgia*, 394 U.S. 557.

The most comprehensive decision to plumb the First Amendment dimension of this right to privacy is the cele-

brated *Flag Salute* case, *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624. "To sustain the compulsory flag salute," the Court said, in terms singularly appropriate here,

> ". . . we are required to say that a Bill of Rights which guards the individual's right to speak his mind, left it open to public authorities to compel him to utter what is not [or for that matter what is] on his mind." *Id.* at 634.

The District Court sought to justify just such compulsion on the ground that "what a person believes has a central effect on the views and actions taken by that person" and the State has a peculiarly high interest, particularly at the primary school level, in neutralizing "the potential for the exertion of the principles of violent overthrow as a way of life [by school teacher-believers] on the younger, inferior mind . . . [of public school students]" (App., *infra*, p. 13a). The District Court's argument represents a distorted view of the applicable constitutional principles, in addition to those prohibiting the state from punishing beliefs.

Precisely because of the sensitivity and vulnerability of the classroom this Court repeatedly has reaffirmed the principle that "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian* v. *Board of Regents of New York*, 385 U.S. 589, 603. See also, *e.g.*, *Wieman* v. *Updegraff*, 344 U.S. 183; *Sweezy* v. *New Hampshire*, 354

U.S. 234, 250; *Barenblatt* v. *United States*, 360 U.S. 109, 112; *Baggett* v. *Bullitt*, 377 U.S. 360, 369; *Whitehill* v. *Elkins*, 389 U.S. 54, 59-60; *Tinker* v. *Des Moines Community School District*, 393 U.S. 503.

The Florida loyalty statute and oath also suffer fatal defects under the overbreadth doctrine, which has two components. A law is overbroad when it proscribes acts "which legitimately may be proscribed" as well as acts "which may not be proscribed." *Keyishian* v. *Board of Regents of New York*, 385 U.S. 589, 609; *see also, e.g., United States* v. *Robel*, 389 U.S. 258, 267-68; *Schneider* v. *Smith*, 390 U.S. 17, 24; *Elfbrandt* v. *Russell*, 384 U.S. 11. A law is also overbroad, in violation of the First Amendment, if some means less restrictive of the essential democratic interest in free communication is available for government to pursue its other subordinating or paramount interests. See, *e.g., United States* v. *Robel, supra; Zwickler* v. *Koota*, 389 U.S. 241, 251; *Shelton* v. *Tucker*, 364 U.S. 479, 488; *Schneider* v. *Smith, supra; United States* v. *O'Brien*, 391 U.S. 367, 376-77. The Florida loyalty statute and oaths suffer from both defects of overbreadth.

They are unconstitutional under the first aspect of the doctrine to the extent that they penalize mere beliefs rather than affirmative unlawful actions or at the very least advocacy which constitutes incitement to imminent unlawfulness. In addition, they reach much too far in proscribing belief in "the overthrow of the Government of the United States or the State of Florida by force or violence" without regard to context.

The Florida statute and oaths are unconstitutional under the second aspect of the overbreadth doctrine as well. The state cannot sustain its burden of demonstrating that no

less restrictive means are available to accomplish its subordinating purpose. The only paramount interests discovered by the District Court to justify imposition of this restriction were "the state's legitimate interest in educating youth and in the teaching of the principle of ordered government and the orderly process for change" (App., *infra*, p. 14a). It is difficult to understand how these restrictions facilitate "educating youth" unless the District Court meant providing exposure (or is it indoctrination?) only to orthodox ideas. Obviously, such an interest cannot survive First Amendment scrutiny. Further, the state certainly can assure "the teaching of the principle of ordered government and the orderly process for change" without infringing upon contrary beliefs by some teachers or even limiting instruction to that principle as though it were immutable. Finally, if the state has a legitimate interest in keeping teachers from indoctrinating grade school, secondary school, or college students with a contrary principle, the state can fulfill that interest without invading the First Amendment province of individual beliefs and advocacy. The state might see to it that instruction is received in the principle of orderly government and processes; conceivably it might sanction purposeful and one-sided indoctrination of students in contrary principles.

B. The second of the provisions upheld by the District Court requires applicants for public employment to "solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida." This provision is very similar to the oath of office prescribed in the United States Constitution, Art. II, §1 (see *Bond* v. *Floyd*, 385 U.S. 116, 135-36), and to the affirmative oaths left standing by this Court in the recent New York

and Colorado cases. *Knight* v. *Board of Regents*, 390 U.S. 36; *Hosack* v. *Smiley*, 390 U.S. 744. Nevertheless, this Court should subject the Florida provision to plenary review and declare it to be in violation of the First Amendment.

Florida's affirmative loyalty oath, unlike others the Court may have considered, is not a mere symbolic and public declaration of fidelity to the Constitution. The statute which prescribes this oath reveals full well that it is an integral part of a comprehensive, repressive program designed to invade the privacy of the oathtaker's mind, and unconstitutionally restrict his beliefs, utterances, and associational activities. This so-called oath of office is bracketed into a statute which on its face contained four additional "negative" test oath requirements, each of which unconstitutionally invaded First Amendment rights. The provisions of that statute (Fla. Stats. Ann. §§876.05-876.10) are themselves found in the middle of Chapter 876 of the Florida Statutes Annotated, which consists of 31 somewhat interrelated sections, each dealing with some aspect of "Criminal Anarchy, Communism, Wearing of Masks, Hoods, Etc." As the Supreme Court of Florida dispositively ruled:

> "The obvious legislative purpose in enacting the subject statute was to prevent the election or employment of public officials and employees who are knowingly disloyal to the government of the United States or to the State of Florida and who subscribe to the doctrine of accomplishing change in government by the employment of force and violence." *Cramp* v. *Board of Public Instruction of Orange County*, 137 So.2d 828, 830 (1962).

Further the District Court upheld this remaining oath for precisely the same reasons it upheld the "belief" provision.

The single remaining oath should be evaluated in that statutory context, not in isolation. *Compare, e.g., Keyishian* v. *Board of Regents,* 385 U.S. 589; *Whitehill* v. *Elkins,* 389 U.S. 54. When viewed in this context, the statutory and oath provision must be voided for all the reasons elaborated in the opinions of this Court and the District Court striking down three of the "negative" clauses and the reasons already suggested in this Jurisdictional Statement for striking down the fourth and remaining "negative clause." *Compare Richardson* v. *Cole,* 300 F. Supp. 1321 (D. Mass. 1969), in which an entire statute prescribing two oaths, one negative and the other affirmative, was voided although the court addressed only the unconstitutionality of the negative oath.

II.

On their face and as applied, the two statutory and oath provisions left standing by the District Court violate the due process clause of the Fourteenth Amendment in that they are unduly vague and provide no opportunity for clarification hearing or procedure.

A "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally* v. *General Construction Co.,* 269 U.S. 385, 391; *Lanzetta* v. *New Jersey,* 306 U.S. 451, 453; *Winters* v. *New York,* 333 U.S. 507, 515. Indefinite oath statutes

have a special vice. Not only are they impermissibly vague, but in their vagueness they "abut upon sensitive areas of basic First Amendment freedoms. The uncertain meanings of the oaths require the oath-taker . . . to 'steer far wider of the unlawful zone,' *Speiser* v. *Randall,* 357 U.S. 513, 526 . . . , than if the boundaries of the forbidden area were clearly marked." *Baggett* v. *Bullitt,* 377 U.S. 360, 372. This further aggravation of the vice of vagueness demands the strictest standard of application, lest the free dissemination of ideas be the loser. *E.g., Cramp* v. *Board of Public Instruction of Orange County,* 368 U.S. 278, 287; *Smith* v. *California,* 361 U.S. 147, 151; *Whitehill* v. *Elkins,* 389 U.S. 54.

It is impossible to know what is meant by the declaration "I do not believe in the overthrow of the Government . . . by force or violence." Initially, the oath-taker does not know what the statute and oath contemplate by "believe in." Does it include speculative or tentative belief? Commitment to the policy of violent overthrow? Approval of violent overthrow under any or all circumstances? As already noted, it is not at all clear that government may proscribe or scrutinize these or any other such beliefs *qua* beliefs. Even if beliefs can be restricted with sufficient certainty, an oath-taker does not know what is contemplated by the phrase "overthrow of the Government." Does this mean an individual may not believe in the violent overthrow of a tyrannical government that has come to power by unlawful and violent means and has suspended or discarded the Constitution? If not, what does it mean? Cf. *Richardson* v. *Cole,* 300 F. Supp. 1321 (D. Mass. 1969), voiding for vagueness a loyalty statute containing the phrase "I will oppose the overthrow of the government. . . ."

Particularly when viewed in the context of the total statute, as Judge Simpson recognized dissenting below, the requirement that a public employee must swear to "support the Constitution of the United States and the State of Florida" is also so vague that few persons of common intelligence will agree upon the obligations which the oath imposes. The range of activities which might reasonably be deemed to be inconsistent with the affirmative oath in its negative statutory context is so broad in scope that a conscientious affiant could reasonably fear that he is asked to refrain from unascertainable areas of constitutionally protected speech and assembly. It is possible, for example, that the phrase "support the Constitution" may mean the avoidance of any categorically direct violation. Perhaps, more plausibly, the phrase requires avoidance of open and active criticism of the form of government established by the Constitution or of any advocacy to overthrow the government. If such is the meaning of the phrase, the statute purports to proscribe activities which include constitutionally protected activity. This Court has clearly ruled that not all advocacy, but only advocacy constituting incitement to imminent lawlessness, may be proscribed or limited by government. See, *e.g.*, *Brandenburg* v. *Ohio*, 395 U.S. 444; *Yates* v. *United States*, 354 U.S. 298; *Noto* v. *United States*, 367 U.S. 290. At the very least, the term, if it has any meaning at all in this context, proscribes "alteration of . . . the constitutional form of government of the United States" and the State of Florida, a compulsory undertaking which this Court recently held to violate the Constitution. *Whitehill* v. *Elkins*, 389 U.S. 54, 57.

The vices which prompted this Court to strike down oaths and statutes in *Speiser, Cramp, Baggett, Elfbrandt, Key-*

ishian, and *Whitehill, supra,* are all present in the Florida statute and affirmative oath. The conscientious teacher who takes the oath cannot but be deterred from exercising First Amendment rights guaranteed him by the very Constitution he has sworn to support. The oath, in this statutory context, must fall because teachers "of character and integrity may well forgo their calling rather than risk prosecution for perjury or compromise thier commitment to intellectual and political freedom." *Elfbrandt* v. *Russell,* 384 U.S. 11, 18. The oath and statute must fall because: "We are in the First Amendment field. The continuing surveillance which this type of law places on teachers is hostile to academic freedom." *Whitehill* v. *Elkins,* 389 U.S. 54, 59-60.

The danger of vagueness in the Florida oath requirements is magnified by the fact that the statute provides for no mechanism by which the oathtaker may receive clarification of the oath. Under Fla. Stats. Ann. §§876.05-876.10, the prospective employee for whom negotiations are complete, save for the oaths (as was the case of the appellant), is given no opportunity to prove his loyalty or explain his reasons for refusing to sign the oaths. If he fails to sign at such a later stage, not only does he forfeit a position for which he is otherwise qualified or pay for work performed, but even more seriously, he suffers the stigma of having balked at the oath, however scrupulous may have been his reasons.[2] The absence of such a proce-

[2] There are many reasons, including conscientious objection (see, *e.g., Torcuso* v. *Watkins,* 367 U.S. 488; *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624), why one might balk at taking such oaths. See also, *e.g., Aptheker* v. *Secretary of State,* 378 U.S. 500, 511-12; *Baggett* v. *Bullitt,* 377 U.S. 360, 367-70; *Keyishian* v. *Board of Regents,* 385 U.S. 589, 600-01.

dure is equally harsh on the prospective employee who discovers the oath early in his quest for a government position; after such a discovery, he is unlikely to reach the stage at which he could even challenge the constitutionality of the oath requirement, as the appellant has done here. As Judge Wright suggested in a case very similar to the one under review, "I believe that such a result is inconsistent with the rigorous due process standards which govern the regulation of speech and association." *Haskett* v. *Washington,* 294 F. Supp. 912, 916 (D.D.C. 1968) (concurring opinion).[3]

Such indications as we have in Supreme Court decisions are to the effect that due process requires some type of hearing before a non-signer may be disqualified solely because he will not sign a required oath. *Cf. Speiser* v. *Randall,* 357 U.S. 513; *Lamont* v. *Postmaster General,* 381 U.S. 301. Recent decisions of the Court point the way to

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[3] This due process defect is part and parcel of the vagueness doctrine. Mr. Justice Brennan's concurring opinion in *United States* v. *Robel,* 389 U.S. 258, provides one of the most recent full dress analysis of the vagueness doctrine, when isolated from the overbreadth doctrine. His analysis matches the Court's positions in *Interstate Circuit* v. *City of Dallas,* 390 U.S. 676, 684-85 and *Shuttlesworth* v. *City of Birmingham,* 394 U.S. 147. It demonstrates that when an allegation of vagueness is made in a complaint, it is taken to include lack of procedural safeguards. As Justice Brennan suggested, a vague statute has one or a combination of three deficiencies. "First . . . . [a] failure to provide adequate standards [which] reflects Congress' failure to have made a 'legislative judgment.'" 389 U.S. at 275. "Second. . . . [A failure to] take steps to assure, 'respect for constitutional liberties' by preventing the existence of 'a wide gulf between the responsibility for the use of . . . power and the actual exercise of that power.' Procedural protections to avoid that gulf have been recognized as essential when fundamental freedoms are regulated." *Id.* at 277-78. "Third. The indefiniteness of the delegation . . . also results in inadequate notice to affected persons." *Id.* at 281.

a guarantee for the prospective employee who risks the stigma of a non-signer. *Slochower* v. *Board of Higher Education,* 350 U.S. 551, is particularly apposite. There the Court refused to permit New York to draw an automatic inference of disloyalty from an employee's invocation of the Fifth Amendment privilege against self-incrimination. *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, and *Konigsberg* v. *State Bar of California,* 353 U.S. 252, extended a comparable protection to applicants for admission to the bar who were suspected of disloyalty because of their refusal to disclose certain past associations.[4]

On the basis of these precedents, a three-judge federal district court found Idaho's loyalty oath unconstitutional because it afforded no procedure by which the non-signer might explain his actions and vindicate his loyalty. *Heckler* v. *Shepard,* 243 F. Supp. 841, 845 (D. Idaho 1965).

The provisions in the instant case are constitutionally vulnerable on just this ground. As developed also in *Slochower,* to draw an inference of disloyalty and disqualification from an unexplained refusal to sign—and without even affording an opportunity to explain—deprives the applicant of due process of law in the most basic sense. Thus, the instant loyalty oath scheme is procedurally as well as substantively deficient. See also, *Speiser* v. *Randall,* 357 U.S. 513; *Haskett* v. *Washington,* 294 F. Supp. 912, 918 (D.D.C. 1968) (concurring opinion).

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[4] In recent cases concerning control of obscenity, the Court has also stressed the importance of hearings when First Amendment rights may be jeopardized by government action. See *Freedman* v. *Maryland,* 380 U.S. 51; *A Quantity of Books* v. *Kansas,* 378 U.S. 205; *Bantam Books* v. *Sullivan,* 372 U.S. 58; *Marcus* v. *Search Warrant,* 367 U.S. 717.

III.

The District Court erred in ruling that some portions of the Florida statute and oath were severable from the unconstitutional portions.

The Florida statute, §§876.05-876.10, is an interwoven and comprehensive whole. The entire statute and the entire oath are void, even if portions might have been valid if they had been enacted alone.

When, in the course of reviewing decisions of state courts, the Court declares a state provision unconstitutional, it customarily remands to the state court for determinations of severability. See *Bell* v. *Maryland*, 378 U.S. 226, 240-241; *Skinner* v. *Oklahoma*, 316 U.S. 535, 543; *Dorchy* v. *Kansas*, 264 U.S. 286, 289-91. However, even when reviewing state court decisions this Court has consistently declared that "in the absence of a controlling state decision, [it] may, in passing upon the claim under the Federal law, decide also the question of severability. But it is not obliged to do so." *Dorchy* v. *Kansas*, 264 U.S. 286, 291, quoted with approval in *Bell* v. *Maryland*, 378 U.S. 226, 240. On the other hand, "In cases coming from the lower Federal courts, such questions of severability, if there is no controlling state decision, must be determined by this court," *Dorchy* v. *Kansas*, 264 U.S. 286, 291; *Williams* v. *Standard Oil of Louisiana*, 278 U.S. 235, by applying the severability rules of the state. See, *e.g.*, *Reitz* v. *Mealey*, 314 U.S. 33, 38-39; *In re Wisconsin Builders Supply Co.*, 239 F.2d 649, 656-657 (7th Cir. 1956); *Commerce Oil Refining Corp.* v. *Minor*, 170 F. Supp. 396, 405 (D. R.I. 1959).

It is, therefore, appropriate for this Court to resolve the severability question posed in this case. The issue being a purely legal one of legislative purpose, nothing would be gained by remanding the case to the federal district court for disposition.

After this Court's 1961 decision in *Cramp*, the case was remanded to the Supreme Court of Florida. The Florida Court ruled that this Court had declared only one phrase in the oath and statute unconstitutional: " . . . that I have not [lent] and will not lend my aid, support, advice, counsel or influence to the Communist Party; . . . ". Applying Florida rules of severability, it then held that the void provision was severable from the statute and oath, and all else remained in force. 137 So.2d 828 (1962).

However, since it is now clear that not just one but between three and five of the five operative provisions of the oath and the statute are unconstitutional, the severability issue must be considered anew. Obviously if, as appellant has contended, all of the operative provisions are unconstitutional, the entire statute (§§876.05-876.10 Fla. Stats. Ann.) should be voided. The five sections of the statute are concerned solely with the loyalty oaths and their enforcement; they have no other reason to exist *Compare Whitehill* v. *Elkins*, 287 F. Supp. 61 (D.Md. 1968) (on remand from the Supreme Court). Even if one or two of the operative clauses were considered to be constitutional if enacted alone, the entire statute and oath still should be declared unconstitutional. So little would remain of the scheme enacted by the legislature that: "We have no way of knowing whether the Legislature would have enacted . . . [it] without the provision[s] which we conclude to be invalid. We are unable to decide

that these provisions are separable." *Pedlosky* v. *Massachusetts Institute of Technology*, 352 Mass. 127, 224 N.E.2d 414, 416 (1967). *Accord, Richardson* v. *Cole*, 300 F. Supp. 1321 (D. Mass. 1969); *Whitehill* v. *Elkins*, 287 F. Supp. 61 (D. Md. 1968).

CONCLUSION

Since 1961 this Court, and the nation's other courts, consistently have voided loyalty oaths and statutes such as the ones at issue in this case. This case, the direct descendant of the *Cramp* case, provides the Court with an opportunity to settle finally the constitutional controversy over negative test oaths and to evaluate an affirmative oath in such a negative context. Therefore, for the reasons set forth in the foregoing Jurisdictional Statement, the Court should take advantage of this opportunity and exercise plenary review over this case.

Respectfully submitted,

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January 1970

APPENDIX

Opinion

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

No. 69-34-Orl-Civ

STELLA CONNELL, individually, and on behalf of all persons similarly situated,

Plaintiff,

—v.—

JAMES M. HIGGINBOTHAM, Superintendent of the Orange County Board of Public Instruction; LOUISE BREEZE, Chairman of the Orange County Board of Public Instruction; and LOWELL CLEMENTS, RAYMOND H. BASSETT, WILLIAM D. LARUE, HARLEY THOMPKINS, MRS. LEE K. DAVIES and STEWART M. SCHAFFER,

Defendants,

FLOYD T. CHRISTIAN, Commissioner of Education, State of Florida,

Intervenor.

Before SIMPSON, Circuit Judge, and YOUNG and SCOTT, District Judges.

SCOTT, District Judge:

The plaintiff in this case, a teacher in the Orange County, Florida, school system, seeks on behalf of herself and others similarly situated to have Section 876.05 of the Florida Statutes declared unconstitutional. In addition, plaintiff requests that a permanent injunction be granted restraining the defendants, their agents, officers and employees from executing or enforcing the provisions of this alleged unconstitutional section. Plaintiff alleges violation of her rights, privileges and immunities as a citizen of the United States, as secured by the First, Fifth and Fourteenth Amendments to the United States Constitution.

Jurisdiction exists under 28 U.S.C. § 1343(3), 28 U.S.C. § 2201 and 42 U.S.C. § 1983.

Plaintiff alleges that (1) the loyalty oath contained in Section 876.05 of the Florida Statutes, which all state employees are required to execute as a condition of employment, is so vague and ambiguous that it cannot be interpreted with any reasonable degree of certainty and, since a purported violation of this section can subject one to criminal prosecution under Section 876.10 of the Florida Statutes, plaintiff is denied due process of law as guaranteed by the Fifth and Fourteenth Amendments, and (2) the oath abridges plaintiff's rights to freedom of speech, assembly and association as guaranteed under the First and Fourteenth Amendments.

This case was heard by a three-judge panel pursuant to 28 U.S.C. §§ 2281, 2284.

FACTS

On or about January 16, 1969, plaintiff made application for a teaching position with the defendant Orange County school system. After interviewing the plaintiff, the princi-

pal of Callahan Elementary School, Orlando, Orange County, Florida, recommended that the plaintiff be considered for employment as a substitute teacher for the fourth grade at that school. Plaintiff was told that she could begin her teaching duties on January 27, 1969, pending routine recommendation by the superintendent and approval by the Board of Public Instruction of Orange County.

At no time prior to her employment was the plaintiff informed by the defendants of the necessity that she sign a loyalty oath; it appears, however, that the plaintiff had some knowledge of Section 876.05 of the Florida Statutes at the time she commenced employment. On February 7, 1969, plaintiff was asked to execute the oath prescribed by the statute. Plaintiff declined, informing the defendants that the particular oath had been declared unconstitutional in *Cramp* v. *Board of Public Instruction of Orange County*, 368 U. S. 278 (1961). Defendants later asked plaintiff to sign a version of the oath as judicially amended by *Cramp* v. *Board of Public Instruction*, 137 So. 2d 528 (Fla. 1962). Plaintiff also refused to sign this oath. At this point processing of plaintiff's employment papers was halted, prior to their consideration by the Board of Public Instruction of Orange County.

Defendants then informed the plaintiff that they were barred by Section 876.08 of the Florida Statutes from paying the plaintiff for any past or future services rendered by plaintiff until the oath was executed. Plaintiff related to defendants that she anticipated filing suit in the United States District Court and defendants informed plaintiff that she could remain in her teaching post without pay, pending decision on the matter.

On February 26, 1969, the plaintiff filed her complaint against the defendants seeking a hearing and determination

of the federal constitutional issues before a three-judge court, a permanent injunction and an interlocutory injunction pending final determination restraining the defendants from discharging the plaintiff as a teacher in the Orange County school system or refusing to pay her salary as a teacher. After the Court denied plaintiff's motion for a temporary restraining order plaintiff was dismissed on March 18th by defendants from her substitute teaching position. Plaintiff worked a total of seven weeks and has received no compensation from defendants for her services.

Subsequent to the denial of the plaintiff's request for a temporary restraining order, Floyd Christian, as Commissioner of Education for the State of Florida, requested and was granted leave to intervene in this action as a party defendant.

STANDING

Defendants contest the standing of the plaintiff to bring this action. They base this claim on the fact that plaintiff's application for employment was never considered by the Board of Public Instruction. Defendants contend that the plaintiff was merely a prospective employee being allowed to teach on a temporary basis pending final approval by the Board of Public Instruction. Defendants claim that plaintiff's application might have been rejected by the Board for a number of reasons based on plaintiff's qualifications as a teacher. The defendants conclude that, since plaintiff was never finally employed by the Board, she cannot now properly petition this Court for an injunction to prevent her dismissal and other appropriate relief.

Defendants' argument must fail. It is apparent from the outset that defendants' administrative agents contemplated no reason why plaintiff would not be approved by the

Board of Public Instruction. Defendants admit that final approval by the Board is in reality a routine matter after a recommendation by the superintendent and that permanent teachers are normally allowed to begin their teaching activities prior to approval by the Board. Neither have defendants come forward with convincing evidence of other valid grounds upon which plaintiff's dismissal might have been predicated.

The Orange County school system is an arm of state government and its agents, officers and employees are applying state law. Plaintiff is alleging that action by these state employees applying a state statute violates her constitutional rights. Plaintiff also claims that the application of this alleged unconstitutional statute will result in injury to her, i.e., denial of state employment and withholding of her salary for services rendered to the school system.

We shall not engage in a semantical argument concerning whether state employment is a "right" or a "privilege", but suffice it to say that the essence of due process is contained in the principle that, once the state has made available the benefit of state employment, it cannot predicate that employment on grounds which the state has no right to dictate. "The fact . . . that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution". *Torcaso* v. *Watkins,* 367 U. S. 488, at 495-96 (1960). "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion is patently arbitrary and discriminatory". *Wieman* v. *Updegraff,* 344 U. S. 183, at 192 (1952). If the statute in question is unconstitutional,

then plaintiff is injured by the defendants' refusal to employ her based on her failure to execute the oath, and this injury exists quite apart from the question of whether she was a "permanent" or a "temporary" teacher. Plaintiff, therefore, has the requisite standing to bring this action. See *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961); *Gilmore* v. *James*, 274 F. Supp. 75 (N.D. Texas 1967), affirmed 389 U. S. 572, rehearing denied 390 U. S. 975; *Heckler* v. *Shepard*, 243 F. Supp. 84 (E.D. Idaho 1965).

CLASS ACTION

Plaintiff requests that she be allowed to maintain this action on behalf of all state employees who are required to execute a loyalty oath as a condition of their employment with the state. Defendants argue that plaintiff is not a proper representative of a class of state employees since her application had not been ruled upon by the Board of Public Instruction and, therefore, plaintiff was not a full-fledged state employee.

In order for a class action to be maintained under Rule 23 of the Federal Rules of Civil Procedure, there must be an ascertainable class and a proper representative. *Hamer* v. *Campbell*, 358 F. 2d 215 (5th Cir. 1966). Plaintiff in this case has gone through the application process for securing employment with a state-operated school system. As a condition to her employment with the school system, she was required to execute an oath in accordance with Section 876.05 of the Florida Statutes. If the section is enforced, any person seeking employment with a state agency would be required to execute such an oath as a condition of employment. Therefore, plaintiff's situation is one which is common to an ascertainable class of persons. That class

is all persons seeking employment with any state agency. See *Gilmore* v. *James, supra.* In addition, we find that plaintiff's cause of action meets the other requirements for a class action under Rule 23(a) and (b), Federal Rules of Civil Procedure.

THE OATH

Having disposed of the procedural aspects, we move to consideration of the oath prescribed by Section 876.05 of the Florida Statutes. The section reads in full:

"876.05 State employees; oath

"All persons who now or hereafter are employed by or who now or hereafter are on the payroll of the state, or any of its departments and agencies, subdivisions, counties, cities, school boards and districts of the free public school system of the state or counties, or institutions of higher learning and all candidates for public office, are hereby required to take an oath before any person duly authorized to take acknowledgments of instruments for public record in the state in the following form:

"I, ..., a citizen of the State of Florida and of the United States of America, and being employed by or an officer of ..... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the

Government of the United States or of the State of Flofida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence.

"And said oath shall be filed with the records of the governing official or employment governmental agency prior to the approval of any voucher for the payment of salary, expenses, or other compensation".

It is well settled that a statute will be construed as severable where it is possible to interpret its provisions as distinct and to assume that the Legislature would have enacted the provisions separately. *United States* v. *Jackson*, 390 U. S. 570, 585 (1967). Indeed, this very statute has been said to be severable. *Cramp* v. *Board of Public Instruction*, 137 So. 2d 528 (Fla. 1962).

The required oath contains a series of clauses to which the employee must swear. While all the matters contained in the oath are somewhat related, we feel that each clause has an independent basis for being contained in the oath. As such, the invalidity of certain portions of the oath does not prevent a meaningful application of the valid sections of the oath.

With this view of the statute, it is necessary to consider the separate validity of the clauses of the oath. First, we point out that this statute was the subject of prior litigation in the case of *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961) and *Cramp* v. *Board of Public Instruction*, 137 So. 2d 528 (Fla. 1962). In the *Cramp* case before the Supreme Court of the United States, that Court

ruled that the clause "that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party" was so uncertain and vague that the state, consistent with the due process clause of the Fourteenth Amendment, could not force the employee to take the oath at the risk of subsequent prosecution for perjury or face dismissal. We are, of course, bound by this pronouncement.

We next consider the portions of the statute reading "that I am not a member of the Communist Party" and "that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or Florida by force or violence". Defendants concede that these portions of the oath may not be defensible, and they are correct. The cases are legion striking down similar language. *Whitehill* v. *Elkins*, 389 U. S. 54 (1967); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1966); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *Wieman* v. *Updegraff*, 344 U. S. 183 (1952); *Gilmore* v. *James*, 274 F. Supp. 75, affirmed 389 U. S. 572 (1968), rehearing denied 390 U. S. 975.

The defect in the statute is that it conditions employment on non-membership or, in other words, it equates disloyalty with mere membership. In *Wieman* v. *Updegraff*, 344 U. S. 183 (1952), the issue was a statute which required as a condition of state employment the taking of a loyalty oath that the person was not, and had not been in the preceding five years, a member of any organization listed by the Attorney General as a "communist front" or "subversive". The Supreme Court of Oklahoma had interpreted the statute as excluding persons solely on membership regardless of knowledge of the activities or purposes of the organization. In holding that the statute violated

the due process clause of the Fourteenth Amendment, the Supreme Court said:

> "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when 'each man begins to eye his neighbor as a possible enemy'. Yet under the Oklahoma Act, the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources. . . . Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process." 344 U. S. at 191.

The Supreme Court of Florida, in the case of *State* v. *Diez*, 97 So. 2d 105 (Fla. 1957), read the element of scienter into each of the required portions of the statute; we do not think, however, that this judicial gloss is sufficient to save these portions of the statute from constitutional defectiveness. Recent cases of the Supreme Court of the United States have pointed out that knowing membership cannot be restricted without a showing of a specific intent to further the unlawful aims of the organization.

Elfbrandt v. *Russell*, 384 U. S. 11, 16 L. ed. 2d 321, 86 S. Ct. 1238 (1966), involved an Arizona statute requiring state employees to take a loyalty oath containing provisions subjecting them to criminal penalties and discharge

from employment if they subsequently became or remained a member of the Communist Party or any other organization having for one of its purposes "the violent overthrow of the government of Arizona or any of its political subdivisions, if the employee has knowledge of such unlawful purpose of the organization". The Court stated "Any lingering doubt that proscription of mere knowing membership, without any showing of 'specific intent' would run afoul of the Constitution was set to rest in *Aptheker v. Secretary of State*, 378 U. S. 500, 12 L. ed. 2d 992, 84 S. Ct. 1659". 384 U. S. at 16.

The Court further stated "A law which applies to membership without the specific intent to further the illegal aims of the organization infringes unnecessarily on the protected freedoms. It rests on the doctrine of guilt by association, which has no place here". 384 U. S. at 19.

In *Keyishian v. Board of Regents of New York*, 385 U. S. 589 (1966), the Court further reinforced this point, stating, "Thus mere party membership, even with the knowledge of the party's unlawful goals, cannot suffice to justify criminal punishment. [Citing *Scales v. United States*, 367 U. S. 203 (1961); *Noto v. United States*, 367 U. S. 290 (1961); *Yates v. United States*, 354 U. S. 298 (1956)]; nor may it warrant a finding of moral unfitness justifying disbarment. *Schware v. Board of Bar Examiners*, 353 U. S. 232 (1957)". 385 U. S. at 607.

The Supreme Court of the United States has reaffirmed this view in the recent case of *United States v. Robel*, 389 U. S. 258 (1967). In that case, involving the constitutionality of a section of the Subversive Activities Control Act of 1950, the Court stated:

"The government emphasizes that the purpose of §5(a)(1)(D) is to reduce the threat of sabotage and

espionage in the Nation's defense plants. The Government's interest in such a prophylactic measure is not insubstantial. But it cannot be doubted that the means chosen to implement that governmental purpose in this instance cuts deeply into the right of association. Section 5(a)(1)(D) puts appellee to the choice of surrendering his organizational affiliation, regardless of whether his membership threatens the security of a defense facility, or giving up his job. When appellee refused to make the choice, he became subject to a possible criminal penalty and a $10,000 fine. The statute quite literally establishes guilt by association without any need to establish that an individual's association poses the threat feared by the Government in proscribing it. The inhibiting effect of the exercise of First Amendment rights is clear. It has become axiomatic that precision of regulation must be the touchstone in an area so closely touching our most precious freedoms". 389 U. S. at 264-5.

We, therefore, hold that inclusion in the oath of the clauses "that I am not a member of the Communist Party" and "that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence" unduly infringes upon the right of free association granted by the First and Fourteenth Amendments, and those clauses must be stricken from the oath.

We now give consideration to the portion of the statute which reads "that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence". It should be noted that no cases

have been cited, and the Court is not aware of any cases, in which the Supreme Court of the United States has interpreted precisely this language in a loyalty oath.

The question is what steps may the state reasonably take in order to protect itself and the institution of ordered government from infiltration by those who adhere to the principles of violent overthrow and force. We held supra that clauses equating membership with disloyalty were overbroad in application and infringed upon First and Fourteenth Amendment freedoms. However, we hold that a clause which attempts to ferret out those with personal belief in the overthrow of the government is constitutional. This clause merely attempts to keep out of state employment those who are *personally* opposed to the democratic process. Surely this is a reasonable means to a legitimate end sought by the government.

What a person believes has a central effect on the views and actions taken by that person. It would be difficult to imagine that a person believing in the overthrow of the government by force or violence, just as a person holding any belief, would not attempt to influence others around him to adopt that belief. This principle has exceptional significance when applied to school teachers. Teachers, particularly those of the lower grades, are dealing with young and very impressionable minds. Who can doubt that the teacher is one of the most important persons in the life of any youngster or that the views expressed by the teacher have great impact on the developing attitudes of the child. Moreover, the teacher, in loco parentis, is in the position of having a captive audience upon which to express his views. This is not to say that all teachers make a patent attempt to influence their students to adopt the teacher's views. The attempt, if at all, may be overt or subtle.

Nevertheless, the potential for the exertion of the principles of violent overthrow as a way of life on the younger, inferior mind does exist. This potential presents grave dangers to the state's legitimate interest in educating youth and in the teaching of the principles of ordered government and the orderly process for change. The state may take reasonable steps to prevent frustration of that end. Cf. *American Communications Association v. Douds*, 339 U. S. 382 (1950).

For the same reasons we hold that the section of the oath requiring support of the Constitutions of the United States and of Florida is constitutional. Such an oath does not restrict legitimate exercise of the freedom of speech and of association. The clause in no way impermissibly restricts what the individual may believe, what he may say or to what organization he may belong. Because the clause does not "chill" these First and Fourteenth Amendment freedoms, we hold it to be a legitimate exercise of the state's interest in securing loyal employees. See *Bond* v. *Floyd*, 385 U. S. 116, 135-36 (1966); *Knight v. Board of Regents of University of State of New York*, 269 F. Supp. 339 (S.D. N.Y. 1967), affirmed, memorandum, 390 U. S. 36.

It is, therefore,

ORDERED AND ADJUDGED:

I. The following language of Section 876.05 of the Florida Statutes is constitutional, and the state may condition employment on the execution of an oath containing the following language:

> "I, ..., a citizen of the State of Florida and of the United States of America and being employed by or an officer of ..... and a

recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence".

II. We find that all provisions of the oath prescribed by Section 876.05 of the Florida Statutes other than those stated in (I.) above are unconstitutional and the state may not condition employment on the execution of these disapproved provisions.

III. In light of our previous holding, all but the following language from Section 876.07 of the Florida Statutes is held to be without force or effect:

"Any person having taken the oath provided for in § 876.05 and who thereafter . . . expresses any belief in . . . the overthrow of the government of the United States or of the state by violence or force . . . shall immediately be discharged from his employment by the employing authority and his name shall be removed from the payroll, and thereafter such person shall not be permitted to receive any payment as an employee or an officer where he or she then was serving. Any person seeking to qualify for public office who fails or refuses to file an oath required by this act shall be held to have failed to qualify as a candidate for public office, and the name of such person shall not be printed on the ballot as a qualified candidate".

IV. A permanent injunction will issue from this Court restraining the defendants, their agents, officers and em-

ployees from further enforcement of Sections 876.05 and 876.07 of the Florida Statutes in a form other than that approved above.

V. Since the school term for which plaintiff's contract was to run has now ended, we deem it unnecessary for this Court to consider plaintiff's request for an interlocutory injunction restraining the defendants from dismissing her from her teaching post.

VI. We hold that plaintiff was under no obligation to execute an oath containing unconstitutional language. During the time plaintiff was actually teaching no wholly constitutional oath was offered to the plaintiff by defendants for execution. Accordingly, we feel that in equity and good conscience the plaintiff is entitled to her salary as a substitute teacher for the seven weeks of actual time she spent teaching. However, we affirm the denial of the temporary restraining order by a judge of this panel to prevent the March 18, 1969, dismissal of plaintiff by the defendants. As that judge pointed out in his ruling at the conclusion of the hearing on the application for a temporary restraining order, there was no showing that the plaintiff would suffer irreparable harm by the denial of the temporary restraining order as any loss of wages could be compensated for by any damages awarded in this action.

Since plaintiff's dismissal on March 18, 1969, resulted from her refusal to execute an invalid oath, such dismissal was impermissible on such a basis alone and the plaintiff is entitled to the salary she would have received from March 18, 1969, to the end of the school term in June 1969.

Judgment shall be entered in accordance with this opinion and costs shall be assessed accordingly.

Concurring Opinion

YOUNG, *District Judge.*

I concur with Judge Scott's excellent opinion with the following explanatory remarks. I agree without reservation to Judge Scott's conclusion that the portion of the prescribed oath which reads, "that I do not believe in the overthrow of the Government of the United States or the State of Florida by force or violence" is constitutional. However, I reluctantly concur in the holding that plaintiff is entitled to her salary to June 1969 and that the portions of the prescribed oath reading, "that I am not a member of the Communist Party" and "that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or Florida by force or violence" are unconstitutional only because controlling decisions require such determinations by this Court.

SIMPSON, *Circuit Judge,* concurring in part and dissenting in part:

In major part, I concur. I think that the court has properly disposed of the question of standing and that it correctly decides that this case meets the requirements for a class action prescribed by F.R.Civ.P. Rule 23(a) and (b).

I concur also in the majority's holding that the oath prescribed by the Florida statute (F.S.A., Section 876.05) in the amended form submitted by defendants to plaintiff is unconstitutional in each of the particulars pointed out by

the court.[1] But for similar reasons I would hold that the provision: "that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence", is also unconstitutional.

This provision deals solely with *belief*, with what is in the mind and may remain there forever unexpressed by word or deed. It does not deal with action. It does not even deal with spoken or written words advocating overthrow of government. Surely a teacher is entitled to his or her private, secret thoughts and beliefs. I view this attempt to regulate belief unattended by word or action as more clearly a violation of constitutional rights than provisions requiring an oath that the applicant does not belong to the Communist party, or that he does not belong to an organization listed as subversive by the Attorney General.[2] In those cases belief has at least been acted upon to the extent of joining an organization.

As to the provision requiring a pledge of support of the federal and state constitutions, I am not so certain. This is an innocuous provision. Violation of it would be difficult to charge and probably impossible to prove. For reasons of vagueness alone I am inclined to believe it should be stricken also.

Of course I agree that the plaintiff should be paid for her services to the end of the school term in June 1969, the contract period.

---

[1] The corresponding provisions of Sec. 876.07 of course fall with the portions of Sec. 876.05 held unconstitutional.

[2] Cf. cases cited and quoted from by the majority opinion on pages 9, 10, 11. See further: *Brandenburg* v. *State of Ohio*, 1969, 395 U.S. 444, 89 S.Ct. ——, 23 L.Ed.2d 430.

Judgment

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

No. 69-34-Orl-Civ

STELLA CONNELL, individually, and on behalf of all persons similarly situated,

Plaintiff,

v.

JAMES M. HIGGINBOTHAM, Superintendent of the Orange County Board of Public Instruction, LOUISE BREEZE, Chairman of the Orange County Board of Public Instruction, and LOWELL CLEMENTS, RAYMOND H. BASSETT, WILLIAM D. LARUE, HARLEY THOMPKINS, MRS. LEE K. DAVIES and STEWART M. SCHAFFER,

Defendants,

FLOYD T. CHRISTIAN, Commissioner of Education, State of Florida,

Intervenor.

ORDERED AND ADJUDGED:

1. Final judgment shall be and is hereby entered in favor of the plaintiff, Stella Connell, individually, and on behalf of all persons similarly situated, and against the defendants, James M. Higginbotham, Superintendent of

the Orange County Board of Public Instruction, Louise Breeze, Chairman of the Orange County Board of Public Instruction, and Lowell Clements, Raymond H. Bassett, William D. LaRue, Harley Thompkins, Mrs. Lee K. Davies and Stewart M. Schaffer, in accordance with the majority opinion of the Court and the opinion of Circuit Judge Simpson, concurring in part and dissenting in part.

2. The defendants, their agents, officers or employees are permanently enjoined from conditioning employment on the taking of an oath which prescribes "that I am not a member of the Communist Party" or "that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party" or "that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the United States by force or violence", which provisions are now contained in Section 876.05 of the Florida Statutes. The defendants, their agents, officers and employees are likewise permanently enjoined from enforcing Section 876.07 of the Florida Statutes in such a manner as to require the execution of the above disapproved phrases as a condition to remaining in the defendants' employ or as a condition to receiving payment from the defendants for services rendered.

3. The Court retains jurisdiction over this suit for the purpose of insuring compliance with the injunction and the order directed to defendants to pay the plaintiff the salary that has been adjudged to be due and owing.

4. The costs shall be hereafter taxed in favor of the plaintiff and against the defendants.

DONE AND ORDERED this 30th day of October, 1969.

BRYAN SIMPSON
United States Circuit Judge

GEORGE C. YOUNG
United States District Judge

CHARLES R. SCOTT
United States District Judge

Statutes

876.05 *State employees; oath.*—

(1) All persons who now or hereafter are employed by or who now or hereafter are on the payroll of the state, or any of its departments and agencies, subdivisions, counties, cities, school boards and districts of the free public school system of the state or counties, or institutions of higher learning and all candidates for public office, are hereby required to take an oath before any person duly authorized to take acknowledgments of instruments for public record in the state in the following form:

I, ..., a citizen of the State of Florida and of the United States of America, and being employed by or an officer of ..... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence.

(2) Said oath shall be filed with the records of the governing official or employing governmental agency prior

to the approval of any voucher for the payment of salary, expenses, or other compensation.

History.—Comp. §1, ch. 25046, 1949.

Note.—See 7 L.Ed. 2d 285 and 137 So. 2d 828 as to constitutionality of section.
cf.—§90.01, Oaths, requirements.

876.06 *Discharged for refusal to execute.*—If any person required by §§876.05-876.10 to take the oath herein provided for fails to execute the same, the governing authority under which such person is employed shall cause said person to be immediately discharged, and his name removed from the payroll, and such person shall not be permitted to receive any payment as an employee or as an officer where he or she was serving.

History.—Comp. §2, ch. 25046, 1949.

876.07 *Persons giving aid, advice, etc., to communist party.*—Any person having taken the oath provided for in §876.05 and who thereafter should become a member of the communist party or who lends aid, support, advice, counsel or influence to the communist party or who expresses any belief in or advocates the overthrow of the government of the United States or of the state by violence or force or thereafter becomes a member of an organization or party which believes in or teaches directly or indirectly the overthrow of the government of the United States or of the state by force or violence, shall immediately be discharged from his employment by the employing authority and his name shall be removed from the payroll, and thereafter such person shall not be permitted to receive any payment as an employee or an officer where he or she then was serving. Any person seeking to qualify for public office who fails or refuses to file the oath required by this act shall be held to have failed to qualify as a candidate for

public office, and the name of such person shall not be printed on the ballot as a qualified candidate.

History.—Comp. §3, ch. 25046, 1949.

876.08 *Penalty for not discharging.*—Any governing authority or person, under whom any employee is serving or by whom employed who shall knowingly or carelessly permit any such employee to continue in employment after failing to comply with the provisions of §§876.05-876.10, shall be guilty of a misdemeanor and shall be punished by a fine not exceeding five hundred dollars or by imprisonment not exceeding six months or by both fine and imprisonment.

History.—Comp. §4, ch. 25046, 1949.

876.09 *Scope of law.*—

(1) The provisions of §§876.05-876.10 shall apply to all employees and elected officers of the state, including the Governor and constitutional officers and all employees and elected officers of all cities, towns, counties and political subdivisions, including the educational system.

(2) This act shall take precedence over all laws relating to merit, and of civil service law.

History.—Comp. §§5, 7, ch. 25046, 1949.

876.10 *False oath; penalty.*—If any person required by the provisions of §§876.05-876.10 to execute the oath herein required executes such oath, and it is subsequently proven that at the time of the execution of said oath said individual was guilty of making a false statement in said oath, he shall be guilty of perjury, and shall be prosecuted and punished for the crime of perjury in the event of conviction.

History.—Comp. §6, ch. 25046, 1949.

Loyalty Oaths

LOYALTY OATH

As required by Chapter 25046 (No. 50) Acts of 1949

I, ... a citizen of the State of Florida and of the United States of America, and being employed by or an officer of ..... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the government of the United States or of Florida by force or violence.

.....

STATE OF FLORIDA,
COUNTY OF .....

Personally appeared before me ..... who states ..... has read the foregoing oath and is familiar with what it says and that ..... signed it freely and voluntarily, and in my presence.

SWORN TO before me this .....
day of ..... A.D. 19.....

.....

LOYALTY OATH

As required by Chapter 25046 (No. 50) Acts of 1949

"I, ... a citizen of the State of Florida and of the United States of America, and being employed by or an officer of ..... and a recipient of public funds as such employee or officer do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence."

.....

STATE OF FLORIDA,
COUNTY OF ....., *ss.*:

Personally appeared before me ..... who states ..... has read the foregoing oath and is familiar with what it says and that ..... signed it freely and voluntarily, and in my presence.

SWORN TO and subscribed to and before me this ..... day of ....., A.D. 196.....

.....
Notary Public

MY COMMISSION EXPIRES:

.....

(NOTARY SEAL)

Stipulation in *Adams* v. *Board of Regents of the State of Florida*

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

Civil Action No. 69-240

DR. PAUL ADAMS, *et al.*,

Plaintiffs,

—v.—

THE BOARD OF REGENTS OF THE STATE OF FLORIDA, *et al.*,

Defendants.

STIPULATION

IT IS HEREBY stipulated and agreed by and between counsel for the respective parties as follows:

1. That ANNE C. BARDSLEY and EVAN SUITS come within the class affected by the outcome of this litigation, and shall be joined as parties Plaintiff in this cause.

2. That LEROY L. LAMBORN, ANNE C. BARDSLEY and EVAN SUITS have refused to sign the loyalty oath prescribed by Section 876.05 of the Florida Statutes, as modified by the decision of this Court in *Connell* v. *Board of Public Instruction*, a copy of the oath furnished to these Plaintiffs being annexed hereto and incorporated herein by reference as Exhibit "1".

3. That as a direct result of the refusal of these Plaintiffs to execute under oath the loyalty oath attached hereto as Exhibit "1", LAMBORN, BARDSLEY and SUITS were discharged from their employment by the University of Florida on November 26, 1969.

4. That LEROY L. LAMBORN had been employed by the University of Florida as Assistant Professor of Law for the Academic year 1969-1970 at a salary of $12,000.00, a copy of his appointment of employment being attached hereto and incorporated herein by reference as Exhibit "2".

5. That EVAN SUITS had been employed by the University of Florida as Interim Instructor in the Department of Psychology at a monthly salary of $375.00 for the academic year, 1969-1970.

6. That ANNE C. BARDSLEY had been employed by the University of Florida as a Clerk II in the Library system, at a monthly salary of $314.00 for the period of July 1, 1969 to June 30, 1970.

7. That the academic year, 1969-1970, at the University of Florida commenced September 16, 1969, and concludes June 15, 1970.

DATED this 17th day of December, 1969.

/s/ RIVERS BUFORD, JR.

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

NO. [redacted] 179

STELLA CONNELL, individually, and on behalf of all persons similarly situated,

Appellant,

v.

JAMES M. HIGGINBOTHAM, Superintendent of the Orange County Board of Public Instruction, LOUISE BREEZE, Chairman of the Orange County Board of Public Instruction, and LOWELL CLEMENTS, RAYMOND H. BASSETT, WILLIAM D. LaRUE, HARLEY THOMPKINS, MRS. LEE K. DAVIES and STEWART M. SCHAFFER,

Appellees (Defendants).

FLOYD T. CHRISTIAN, Commissioner of Education, State of Florida,

Appellee (Intervenor)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF IN SUPPORT OF APPELLEES' MOTION TO AFFIRM OR DISMISS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 1113

STELLA CONNELL, individually, and on behalf of all persons similarly situated,

Appellant,

v.

JAMES M. HIGGINBOTHAM, Superintendent of the Orange County Board of Public Instruction, LOUISE BREEZE, Chairman of the Orange County Board of Public Instruction, and LOWELL CLEMENTS, RAYMOND H. BASSETT, WILLIAM D. LaRUE, HARLEY THOMPKINS, MRS. LEE K. DAVIES and STEWART M. SCHAFFER,

Appellees (Defendants).

FLOYD T. CHRISTIAN, Commissioner of Education, State of Florida,

Appellee (Intervenor)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF IN SUPPORT OF APPELLEES' MOTION TO AFFIRM OR DISMISS

PREFATORY STATEMENT

By benign design this brief will be brief and apposite of the law resident in and controlling of the case at bar.

Justice Holmes once mused that: "Sometime the vindication of the obvious is more important than the elucidation of the obscure." And it is in this spirit that this brief addresses itself to:

1. The judgment below,
2. The ground of the law.

Within the context of this presentational scheme appellant's jurisdictional statement will be treated.

I.

THE JUDGMENT BELOW

1. First, the lower Court held the plaintiff-appellant, to be representative of the class of all state employees, to which class the requirement of oath-taking (Section 876.05, Florida Statutes) is indiscriminately applicable. (Opinion pp. 6-7.)

2. Secondly, and foundational to judicial mutation of the statutory oath, the Court held the provisions of the act to be severable. (Opinion p. 8.) The Court cited *United States v. Jackson*, 390 U.S. 570, 585 (1967), and noted the Florida Supreme Court's agreement with the severability doctrine as it related to this very statute. *Cramp v. Board of Public Instruction*, (Fla. 1962) 137 So.2d 528. To which law, and admitting a spate of supporting decisional law, appellant responds with *ipse dixit* that "since it is now clear [to appellant] that not just one, but between three and five of the five operative provisions . . . are unconstitutional," this Court "must" consider the law on the subject *de novo* and the raft of reported cases must be viewed as *tabula rasa*.

Risking ignoration of whatever Pythagorean nexus might, as alleged, obtain as between (a) "three and five of the five operative provisions" and (b) the disvalue of the controlling cases, these appellees urge the said cases as controlling still. (Certainly it would be the most circular of circular arguments to hold the statutory provisions unseverable because "the statute" is unconstitutional, if the unconstitutionality of the statute *in toto* is dependent upon a determination of severability. And to hold the statutory provisions unseverable, despite the case law, because "three" or more provisions strike appellant as unconstitutional would be a coercive *non sequitur*.)[1]

---

[1] See, *American Communications Assn. v. Douds*, 339 U. S. 382 at 393 re. J. Holmes' and J. Reed's derogation of mathematical formulae as criteria of constitutional meaning.

In fine, the statutory oath as upheld below is constituted of two independent, compound clauses each of which is an intelligible compound proposition logically autonomous, however ideologically consonant. (See appellant's brief, pp. 10, 14a-15a)

3. Citing to a raft of decisions invalidating oath provisions exacting declarations of non-membership in certain organizations, the lower Court struck down such exactions as appeared in the subject oath. (Opinion pp. 8-12.)

4. The Court below, in recognition of the psychological datum that belief is a spring to behavior or at least that the two are functionally inextricable, held constitutional the provision, " . . . that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence . . ." (Opinion pp. 12-13.)

The lower Court was not unaware that "As in *Cramp v. Board of Public Instruction* . . . [the Supreme Court does] not question the power of a state to take proper measures safeguarding the public service from disloyal conduct." *Baggett v. Bullit*, 377 U. S. 360, 380, (1964) (Opinion of Clark, J.). For clearly the Bill of Rights has not been converted into a "suicide pact." *Terminello v. Chicago*, 377 U. S. 1, 37 (1949). And with "education . . . perhaps the most important function of state and local governments," *Brown v. Board of Public Education of Topeka*, 347 U. S. 483, 493, a function which is the "principal instrument in awakening the child to cultural values . . ." *Ibid*, the lower Court sustained a mild measure somewhat protective of the community's interest in its posterity. (Opinion pp. 12-13.)[2]

---

[2]See, Weaver, *The Ethics of Rhetoric*, "Dialectic and Rhetoric at Dayton, Tenn." at pp. 36-38, for arguments of Clarence Darrow (in the Leopold & Loeb case) and William Jennings Bryan (in the Scopes trial) testifying to the formidable effects of even subtle educational experiences.

"Indeed, it is plain that a state has a clear interest in assuming '. . . careful and discriminating selection of teachers' by its publicly supported educational institutions. See *Shelton v. Tucker*, 364 U. S. 479, at 495-496 . . . (dissenting opinion of Frankfurter, J.); see also majority opinion at 485 . . ." *Knight v. Board of Regents of University of State of New York*, (S.D.N.Y. 1967) 269 F.Supp. 339, at 342, aff'd. 390 U. S. 36 (1968).

5. Finally, the lower Court found nothing destructive of, nor antithetic to, First or Fourteenth Amendment freedoms by requiring of government employees the taking of an oath in support of the constitutions of the United States and Florida. Indeed this Court has, albeit in dicta, expressly sanctioned state exaction of an oath of support of the Constitution. *Bond v. Floyd*, 385 U. S. 116, 135 (1966).

One of the most succinct and applicable judicial statements on this limited subject issued in *Gilmore v. James*, 374 F. Supp. 75, 92 (1967):

> "Oaths in support of the government are not abhorent to the Constitution. Indeed the Constitution provides one [citing U. S. Const. Art. II, §1]."

To appellant's assertion that the oath's import is unfathomable or dangerously vague, the concerning opinion of Mr. Justice Harlan (joined by Chief Justice Burger) in *Cole v. Richardson* and *Richardson v. Cole* (March 16, 1970) 38 Law Week 3362, 3363, is, we submit, responsive:

> ". . . almost any word or phrase may be rendered vague and ambiguous by dissection with a semantic scalpel."
>
> • • •
>
> "I think it can be fairly said that subscribing to the instant oath subjected appellant to no more than an amenity. No First Amendment considerations are, in my view, at all involved in this case. This oath does not

impinge on conscience or belief, except to the extent that oathtaking as such may offend particular individuals . . ."

The District Court in *Hosack v. Smiley*, (D. C. Colo. 1967) 276 F.Supp. 876, aff'd 390 U. S. 744 (1968), treated of alleged vagueness or inhibition of precious historical freedoms by tersely observing that an oath to support the constitutional process does not stagger the understanding of "men of common intelligence," (citing *Cramp v. Board of Public Instruction*, 368 U. S. 278, 287) for it is "plain, straightforward and unequivocal." *at* 878.

Note should be made of two recent decisions rendered in approbation of such oaths: *Knight v. Board of Regents of University of the State of New York* (S.D.N.Y. 1967) 269 F. Supp. 399, aff'd 390 U. S. 36 (1968); *Stewart v. Washington* (D.D.C. 1969) 301 F. Supp. 610, 611-612. Indeed, the oath sanctioned in the *Knight* case, *supra*, required one to pledge to "preserve, protect and defend"—beyond merely supporting —the Constitution. *Knight, supra.*

6. The lower Court, thereupon, upheld such provisions of Section 876.07, Florida Statutes, as are apposite of the valid provisions of the oath prescribed in and by Section 876.05, Florida Statutes. (Opinion pp. 14-15.)

II

THE GROUND OF THE LAW

So far forth it has been argued that the judgment below ought to be affirmed, or the appeal therefrom dismissed, by virtue of the lower Court's consideration of all arguments and warranted disposition of the cause. No legal ground has been left unexplored.

But the ground of the lower Court's judgment or the case law upon which it rested deserves expression.

An appropriate point of departure is Mr. Justice Frankfurter's insightful observation in *Minersville School Dist. v. Gobitis*, 310 U. S. 586 (1940) [overruled by *W. Vir. State Board of Education v. Barnette*, 319 U. S. 624 (1943)]:

> "The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment if fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization. 'We live by symbols.' " *at 596.*

There is of this nothing abstruse. "In its simplest definition, a symbol is a conventional sign. A sign represents or signifies: it conveys a meaning. . . . All words are symbols . . . their power is indirect, through their effect on men." Ross, SYMBOLS & CIVILIZATION (1957) 164.

Mr. Justice Frankfurter's observation—with its contemporary referent in the case at bar—is of the first importance. As Professor Ross insists:

> "The bonds of society are the shared symbols, rituals, values, and beliefs of its members, and it is in these that the 'meaning' of the society is contained. . . . Personal freedom yields little of value outside a social order and tradition; it can in fact be guaranteed only in a political and social order, and the value of individual differences, of choice and free intelligence, and the arts and sciences which they nurture, are dependent on shared ritual, symbol and emotion. Our social roots are often forgotten because they are firmly embedded and raise no practical problem. If we forget them overlong, we may uproot them, and with them, ourselves." SYMBOLS & CIVILIZATION, at 172.

In fine, the emotive *sine qua non* of social life is symbolized by such oaths as the one at bar, and appellant did not present to the lower Court evidence of a societal disaffection indicative of such symbols' desuetude. Hence, even as there is no rationale according to which this Court should encourage such a disaffection by denigrating this oath, there is compelling reason for this Court to sanction an existing oath's operation.

Symbols of allegiance are both indicative of social cohesion and, absent massive disaffection, are in turn promotive of its continuation. Chief Justice Waite stated the matter in *Minor v. Happersett*, 88 U. S. 165-166 (1875):

> "The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. . . ."

Though representative of Nineteenth Century formulation, Chief Justice Waite's assertion is not to be doubted as a socio-political proposition of importance. And it is from this matrix that such compelling symbols as the instant oath spring.

CONCLUSION

The judgment of the lower Court is consonant with the decisional law and is reflective of the compelling social realities underlying same. No further argument is warranted.

Therefore, the appellees and intervenor urge this Honorable Court to affirm the judgment below or dismiss the appeal therefrom.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 79

STELLA CONNELL, Individually, and on behalf of all persons similarly situated,

Appellant,

—v.—

JAMES M. HIGGINBOTHAM, Superintendent of the Orange County Board of Public Instruction, LOUISE BREEZE, Chairman of the Orange County Board of Public Instruction, and LOWELL CLEMENTS, RAYMOND H. BASSETT, WILLIAM D. LARUE, HARLEY THOMPKINS, MRS. LEE K. DAVIES and STEWART M. SCHAFFER,

Appellees,
(Defendants)

FLOYD T. CHRISTIAN, Commissioner of Education, State of Florida,

Appellee.
(Intervenor)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 79

STELLA CONNELL, Individually, and on behalf of all persons similarly situated,

Appellant,

—v.—

JAMES M. HIGGINBOTHAM, Superintendent of the Orange County Board of Public Instruction, LOUISE BREEZE, Chairman of the Orange County Board of Public Instruction, and LOWELL CLEMENTS, RAYMOND H. BASSETT, WILLIAM D. LaRUE, HARLEY THOMPKINS, MRS. LEE K. DAVIES and STEWART M. SCHAFFER,

Appellees,
(Defendants)

FLOYD T. CHRISTIAN, Commissioner of Education, State of Florida,

Appellee.
(Intervenor)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF APPELLANT

Opinions Below

The Order of March 18, 1969, of the United States District Court for the Middle District of Florida, Honorable George C. Young presiding, denying a temporary restraining order is not reported; it is printed in the Appendix

at p. 13.[1] The decision from the bench by the Honorable George C. Young denying the temporary restraining order is not reported, and is printed in the Appendix at p. 34. The decision of the statutory three judge United States District Court for the Middle District of Florida and the concurring and dissenting opinions are reported at 305 F. Supp. 445. The opinions and the judgment are also set out in the Appendix at p. 141. The opinions and the orders in the related case of *Adams* v. *Board of Regents*, No. 105 in the October Term, 1970 which was docketed on March 5, 1970 are not reported, they are printed in the appendix contained in this brief, *infra*, at pp. 7a-19a.

Jurisdiction

This class suit was brought under 28 U.S.C. §§1331, 1343, 2201, 2202, 2281 and 2284, Rule 23 of the Federal Rules of Civil Procedure, and the First, Fifth and Fourteenth Amendments to the Constitution of the United States to declare unconstitutional and enjoin enforcement of the provisions of Florida Statutes Annotated §§876.05-876.10 and of the loyalty oaths required pursuant to them as a condition of public employment. The order of the three-judge District Court denying some of the appellant's prayers for relief was dated October 30, 1969, and notice of appeal was filed in the District Court for the Middle District of Florida on November 25, 1969. The Jurisdictional Statement was filed on January 23, 1970; probable jurisdiction was noted by this Court on June 8, 1970. The juris-

[1] The Appendix references will be noted as Jt. App. The references to the appendix contained in this brief will be noted App., *infra*.

diction of the Supreme Court to review this decision and order by direct appeal is conferred by 28 U.S.C. §1253. The following decisions, among many, sustain the jurisdiction of the Supreme Court to review the judgment and order on direct appeal in this case: *Palmetto Fire Ins. Co.* v. *Conn*, 272 U.S. 295, 305; *Florida Lime and Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73, 85; *Shelton* v. *Tucker*, 364 U.S. 479; *Baggett* v. *Bullitt*, 377 U.S. 360; *Flast* v. *Cohen*, 392 U.S. 83.

Constitutional Provisions, Statutes and Oaths Involved

Involved here are the First, Fifth and Fourteenth Amendments to the United States Constitution, §§876.05-876.10 of Fla. Stats. Ann., and the various loyalty oaths upon which appellant's employment as a school teacher was conditioned. The statutory provisions and oaths to which she was subjected are set forth in the Appendix, *infra*, pp. 2a-6a.

Questions Presented

1. Do the portions of the Florida loyalty statute and oath that were validated by the Court below violate, on their face and as applied, the freedoms of expression, belief, and privacy guaranteed by the First, Fifth and Fourteenth Amendments?

2. Are the portions of the Florida loyalty statute and oath that were validated by the Court below, on their face and as applied, unduly broad in violation of the First, Fifth and Fourteenth Amendments?

3. Do test oaths, whether negative or affirmative in formulation, necessarily violate constitutional freedoms of expression, belief, and privacy?

4. Do the portions of the Florida loyalty statute and oath that were validated by the Court below violate, on their face and as applied, the due process clause of the Fourteenth Amendment in that they are unduly vague and provide no opportunity or procedure for clarification?

5. Did the Court below err in ruling that some portions of the Florida loyalty statute and oath were severable from the unconstitutional provisions?

Statement of the Case[1a]

The appellant is a citizen of the United States and resides in Orange County, Florida. The appellees are the Superintendent of Public Instruction of Orange County, Florida and the Chairman and members of the Board of Public Instruction of Orange County, Florida. After the Complaint was filed, the Commissioner of Education of the State of Florida was granted leave to intervene as a party defendant and presently is an appellee before this Court.

On or about January 16, 1969, appellant made application for a teaching position with the Orange County school system (Jt. App. p. 142). She was interviewed by the principal of Callahan Elementary School, Orlando, Orange County (Jt. App. p. 142). On or about January 27, 1969 she was employed as a classroom teacher in the Fourth Grade of that school by the appellees and their agents (Jt. App. pp. 142-43).

[1a] This statement of the case is taken from the opinion on the merits by the court below, except where facts are not noted in that opinion.

At no time prior to her employment was the appellant informed by the appellees that execution of a loyalty oath was a condition of her employment and payment by the appellees (Jt. App. p. 143). The District Court did find, however, that she had some knowledge of the applicable statute at the time she commenced the employment (Jt. App. p. 143). On February 7, 1969, the appellees notified appellant that she would be required to execute a loyalty oath as a condition of continuing her employment (Jt. App. p. 143). Specifically she was asked to declare:

> "I, ..., a citizen of the State of Florida and of the United States of America, and being employed by or an officer of ..... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence" (Jt. App. pp. 10-11).

The District Court found that the oath was identical to the one declared unconstitutional by this Court nine years ago in a case involving the precise statute at issue in the instant case and many of the same parties-defendant in their official capacities. *Cramp* v. *Board of Public In-*

struction of Orange County, 368 U.S. 278 (Jt. App. p. 143). The appellant declined to execute the oath on the ground that it was invalid and unconstitutional and had been declared so by this Court (Jt. App. pp. 143, 134-40). The appellees then asked appellant to sign a version of the oath as judicially amended by the Supreme Court of Florida on remand from this Court (Jt. App. p. 143). *Cramp* v. *Board of Public Instruction of Orange County,* 137 So.2d 828 (Fla. 1962).[2] The appellant refused to sign the modified oath and the District Court found that processing of her employment papers was halted before final consideration by the Board of Public Instruction (Jt. App. p. 143).

The appellees informed the appellant that they were barred by Section 876.08 of Fla. Stats. Ann. from paying her for past or future services until the oath was executed (Jt. App. p. 143). After they were informed by the appellant that she anticipated filing suit in the United States District Court, the appellees permitted the appellant to remain in her teaching post without pay, pending judicial decision on the matter (Jt. App. p. 143).

On February 26, 1969, the appellant filed her complaint against the appellees. After an evidentiary hearing (see Jt. App. pp. 22-34, 36-70), the District Court denied her motion for a temporary restraining order and she was dis-

[2] On remand, the Supreme Court of Florida ruled that only the phrase "that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party" was constitutionally infirm under this Court's decision. The phrase was declared severable both from the statute and from the oath. Thus the second oath required of appellant was identical to the first one, but for the absence of the void phrase. Notably, the first oath was on a mimeographed "official" form; the second was typed from that master, eliminating the guilty phrase. (A facsimile of the first oath is found at Jt. App. p. 168; App., *infra,* p. 5a. A facsimile of the second oath is found at Jt. App. p. 169; App., *infra,* p. 6a.)

missed by the defendants from her teaching position on March 18, 1969 (Jt. App. pp. 13, 34).

On October 30, 1969, again after an evidentiary hearing (see Jt. App. pp. 71-140), the District Court entered its Judgment, in favor of the appellant individually and on behalf of all persons similarly situated. It ruled, *inter alia*, that: (1) Under Rule 23 of the Federal Rules of Civil Procedure, appellant had standing to maintain a class action "on behalf of all state employees who are required to execute a loyalty oath as a condition of their employment with the state" (Jt. App. p. 145) (305 F. Supp. at 449-50). (2) The phrase in the statute and first loyalty oath, "I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party," had been declared unconstitutional by this Court in 1961 (Jt. App. p. 148) (305 F. Supp. at 450-51). (3) The phrases in the statute and the loyalty oaths, "that I am not a member of the Communist Party" and "that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence," unduly infringed "upon the right of free association granted by the First and Fourteenth Amendments . . ." (Jt. App. p. 148) (305 F. Supp. at 451-52). (4) The phrases in the statute and the loyalty oaths, "that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence" and "I will support the Constitution of the United States and of the State of Florida," are not themselves unconstitutional (Jt. App. pp. 151-52) (305 F. Supp. at 452-53). (5) Under Florida and federal law, the unconstitutional portions of the statute and oath are severable (Jt. App. pp. 147-48) (305 F. Supp. at 450); consequently, the State of Florida still may require a loyalty

oath as a condition of public employment (Jt. App. p. 153) (305 F. Supp. at 453). (6) Since the appellant was discharged solely because she declined to execute an oath containing unconstitutional language, she was entitled to her salary as a substitute teacher for the seven weeks of actual time she spent teaching and for the salary she would have received from March 18, 1969, to the end of the school term in June 1969 (Jt. App. p. 154) (305 F. Supp. at 454).

The defective portions of the statute and oath were declared unconstitutional (Jt. App. p. 153) (305 F. Supp. at 453-54). The appellees were permanently enjoined from conditioning employment on the taking of an oath including the language declared unconstitutional and "from enforcing §876.07 of Florida Statutes in such a manner as to require the execution of the above disapproved phrases as a condition to remaining in the defendants' employ or as a condition to receiving payment from the defendants for services rendered" (Jt. App. p. 157) (305 F. Supp. at 455). Finally, jurisdiction was retained over the suit "for the purpose of insuring compliance with the injunction and the order directed to the defendants to pay the plaintiff the salary that has been adjudged to be due and owing" (Jt. App. p. 157) (305 F. Supp. 455). Circuit Judge Simpson, who concurred in part and dissented in part, would have declared the two remaining phrases in the statute and oaths unconstitutional, under the First and Fourteenth Amendments (Jt. App. p. 155) (305 F. Supp. at 454-55).

On November 25, 1969, Notice of Appeal was filed by the Appellant, appealing from the portions of the District Court's decision and Order sustaining the constitutionality of the two remaining phrases in the statute and loyalty oath, declining to enjoin the appellees from enforcing these and any other applicable portions of the statute, and

declining to declare §§876.05-876.10 unconstitutional in their entirety (Jt. App. pp. 158-59). The appellees have not filed a cross appeal.

Subsequent to the decision and Order of the District Court, employees of the University of Florida were required to execute loyalty oaths in the form presumptively sustained by the District Court in the instant case.

The incident gave rise to a new class action in the United States District Court for the Middle District of Florida. *Adams* v. *Board of Regents of the State of Florida,* Civ. Action No. 69-240, M.D. Fla. Jan. 27, 1970, *juris. statement* filed No. 105 in the October Term, 1970. An affidavit executed by one of the plaintiffs in that suit is a part of the record in the instant case (Jt. App. pp. 140-41).

For the convenience of the Court and because of the close relationship between the two cases, copies of the significant documents in *Adams* are included in the appendix contained in this Brief, *infra,* at pp. 7a-27a, and the facts of that case are recited in full in the footnote which follows immediately.[3]

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[3] The plaintiffs in *Adams* are or were faculty and staff members of the University of Florida and other state institutions under the control of the Board of Regents. The defendants are the Board of Regents of The State of Florida, its individual members, and the President of the University of Florida.

Included among the plaintiffs were eight professors, a teaching assistant and two clerical employees (*Adams* Complaint, p. 2). As a direct consequence of refusing to sign the loyalty oath, three members of appellants' class, a professor of law, an instructor of psychology and a library clerk, have been discharged from their employment (App. *infra,* pp. 9a, 25a-26a).

On October 16, 1969 defendant O'Connell issued a memorandum to all faculty and staff of the University informing them that they would be required to execute the loyalty oath prescribed by

section 876.03 of the Florida Statutes prior to November 15, 1969 (App. *infra*, pp. 8a, 20a-21a).

The form of the oath was identical in all essentials to the oath required of the Appellant Connell in the instant case. (See Exhibit D to *Adams* Complaint). On October 17 a subsequent staff memorandum advised all employees that "any employee refusing to comply with the provisions of this section of the Florida Statutes shall be dismissed" (App. *infra*, p. 22a).

Faced with the Hobson's choice of either subscribing to what they felt was an unconstitutional oath or being summarily dismissed, plaintiffs filed suit on October 24, 1969 requesting the convening of a three-judge court and seeking declaratory and injunctive relief.

The application for a temporary restraining order was heard by District Judge Young on October 30, 1969. Immediately prior to that hearing, the final judgment of a three-judge court was filed in *Connell* v. *Higginbotham*.

As a consequence of the *Connell* decision, Judge Young entered an order in the *Adams* case on November 7, 1969 denying plaintiffs' application for a temporary restraining order, except that the oath submitted to them could not contain the language invalidated by the three-judge court in *Connell* (App. *infra*, pp.14a-19a). The Judge ruled that plaintiffs "have neither shown irreparable damage to them in the event the entire oath were eventually held to be unconstitutional nor shown a likelihood that the portions of the oath approved in the *Connell* case may eventually be held unconstitutional by the Supreme Court of the United States" (App. *infra*, p. 16a). An administrative directive from President O'Connell dated that same day indicated that the revised oath had to be executed by all employees on or before November 20, 1969 as a condition of receiving their salaries (App. *infra*, pp. 23a-24a).

An application for an injunction submitted to Mr. Justice Black was denied on November 19, 1969. It was resubmitted the next day to Mr. Justice Douglas who submitted it to the full Court. It was again denied. 90 S. Ct. 393.

Thereafter a three-judge court was convened, comprised of the same three Judges who ruled in *Connell*. On January 27, 1970 the three-judge court entered its judgment and memorandum. The court ruled that it had jurisdiction, that the plaintiffs had standing to bring the action and that it was properly a class suit (App. *infra*, pp. 9a-10a). The court further ruled that the appellees could condition employment and payment of salary on the execution of the revised loyalty oath; all other portions of the oath were declared unconstitutional. The dismissals of some plaintiffs for refusal to execute the modified oath was upheld. An appeal to this Court was docketed on March 5, 1970, it is now No. 105 in the October Term, 1970. A motion to dismiss or affirm was made on May 22, 1970.

Summary of Argument

Those two portions of the Florida loyalty statute and oaths upheld by the Court below infringe, on their face and as applied, the guarantees of freedom of expression, belief and privacy protected by the First and Fourteenth Amendments. The exacting of an oath that one does not "believe" in the overthrow of the government by force and violence is inconsistent with the teachings of this Court for almost a decade. See, e.g., *Cramp* v. *Board of Public Instruction of Orange County,* 368 U.S. 278; *Whitehill* v. *Elkins,* 389 U.S. 54. If there is anything which is completely protected by the constitutional guarantees flowing from the First Amendment, informed by the notion of privacy, it is the individual's right to *believe* anything he chooses. *Welsh* v. *United States,* 90 S. Ct. 1792, 1813 (White, J., dissenting); *Griswold* v. *Connecticut,* 381 U.S. 479; *Speiser* v. *Randall,* 357 U.S. 513, 536 (Douglas, J., concurring); *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624; *Cantwell* v. *Connecticut,* 310 U.S. 296. Accordingly, this oath is fatally defective under both components of the overbreadth doctrine. It proscribes acts which may not be proscribed, see *Keyishian* v. *Board of Regents of New York,* 385 U.S. 589, and it does so even though means less restrictive of fundamental liberties are available to pursue compelling, subordinating governmental interests. See *United States* v. *Robel,* 389 U.S. 258; *Shelton* v. *Tucker,* 364 U.S. 479. The so-called affirmative oath upheld below is not a mere symbolic amenity but is in effect a negative test oath which is an integral part of a comprehensive and repressive statutory scheme, and has

been so interpreted by the Florida Courts. Viewed as such, it is constitutionally infirm. *Elfbrandt* v. *Russell*, 384 U.S. 11; compare *Ex parte Garland*, 71 U.S. (4 Wall.) 333.

These oaths are unconstitutional abridgments on expression, belief and privacy for another set of reasons. Such test oaths, relics of another time, are indiscriminately imposed without any regard to the nature of the employee's position, despite this Court's insistence that government clearly demonstrate the compelling need for political inquiries. See, e.g., *Gibson* v. *Florida Legislative Investigative Committee*, 372 U.S. 539; *Keyishian* v. *Board of Regents, supra*. Test oaths have always been distrusted. They have little value in themselves and perhaps the only interest they advance is a symbolic show of strength to see how much irrelevant obedience the state can exact from its citizens.

These two oaths also violate due process because they are impermissibly vague and provide no opportunity for a clarification hearing or procedure. The operative terms are so uncertain that men must necessarily guess at their meaning. *Connally* v. *General Construction Co.*, 269 U.S. 385. Such vagueness is even more intolerable in the First Amendment area. *Baggett* v. *Bullitt*, 377 U.S. 360; *Speiser* v. *Randall, supra*.

Finally, the Court below incorrectly ruled that the portions of the statute and oath which it upheld were severable from those it struck down. The provisions are so intertwined in text and in purpose that the tainted portions cannot be severed.

ARGUMENT

POINT I

On their face and as applied, the portions of the Florida loyalty statute and oath declared not unconstitutional by the Court below, violate the First and Fourteenth Amendments' protection of the freedom of expression, belief, and privacy.

The District Court expressly ordered and adjudged that: "The following language of Section 876.05 of the Florida Statutes is constitutional, and the state may condition employment on the execution of an oath containing the following language:

> 'I, ..., a citizen of the State of Florida and of the United States of America and being employed by or an officer of ..... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that [1] *I will support the Constitution of the United States and of the State of Florida; and* [2] *that I do not believe in the overthrow of the government of the United States or of the State of Florida by force or violence*'" (Jt. App., p. 153) (305 F. Supp. at 453). (Emphasis added.)

As a direct result of this ruling, the appellant and members of the class she represents are subject to precisely this oath as a condition precedent to public employment. See *Adams* v. *Board of Regents*, discussed in note 3, *supra*.

Especially in the context of this statute, each of these oath requirements unconstitutionally invades the freedoms of expression, belief and privacy.

A. *The Negative Loyalty Oath Validated by the Court Below Unconstitutionally Invades First Amendment Freedom and Is Overbroad*

The requirement of an oath in the form: "I do not believe in the overthrow of the government of the United States or of the State of Florida by force or violence" is clearly unconstitutional under the First and Fourteenth Amendments. The decision of the Court below is grossly inconsistent with the governing pronouncements of this Court on the meaning and scope of the First Amendment's freedoms of expression and belief.

The Court below proceeded from the notion that the State is free to limit employment opportunities on the basis of putative *beliefs* and only the putative *beliefs* of one who declines to execute a loyalty oath. Such an approach offends the most fundamental assumptions of a free society.[4] It also flies in the face of all the loyalty oath, internal security, and freedom of speech decisions rendered by this Court at least since 1961.[5] As Judge Simpson noted in dissent below:

> "This provision deals solely with *belief*, with what is in the mind and may remain there forever unexpressed

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[4] To the extent that the Court's decisions in *American Communications Ass'n* v. *Douds*, 339 U.S. 382 and *Osman* v. *Douds*, 339 U.S. 846 indicate a contrary principle, they are no longer controlling. See *United States* v. *Brown*, 381 U.S. 437.

[5] As to loyalty oath decisions, see *Cramp* v. *Board of Public Instruction of Orange County*, 368 U.S. 278; *Baggett* v. *Bullitt*, 377 U.S. 360; *Elfbrandt* v. *Russell*, 384 U.S. 11; *Keyishian* v. *Board of Regents*, 385 U.S. 589; *Whitehill* v. *Elkins*, 389 U.S. 54; *James* v. *Gilmore*, 389 U.S. 572, *affirming per curiam*, 274 F. Supp. 75 (N.D. Tex. 1967).

by word or deed. It does not deal with action. It does not even deal with spoken or written words advocating overthrow of government. Surely a teacher is entitled to his or her private, secret thoughts and beliefs. I view this attempt to regulate belief unattended by word or action as more clearly a violation of constitutional rights than provisions requiring an oath that the applicant does not belong to the Communist party, or that he does not belong to an organization listed as subversive by the Attorney General. In those cases belief has at least been acted upon to the extent of joining an organization." (Jt. App., p. 156) (305 F. Supp. at 455).

Judge Simpson's analysis is confirmed by this Court's most recent decisions on freedom of speech, which make it abundantly clear that even spirited advocacy of unlawful activity is immune from state sanction unless it constitutes "incitement to imminent lawless action." *Brandenburg* v. *Ohio*, 395 U.S. 444. See also, e.g., *Street* v. *New York*, 394 U.S. 576; *Watts* v. *United States*, 394 U.S. 705; *United States* v. *Robel*, 389 U.S. 258; *Kingsley Int'l Picture Corp.* v. *Regents*, 360 U.S. 684.

Mere belief, as yet unwedded to any action, not even speech, enjoys even greater protection than advocacy.[6]

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[6] "A citizen may be told when and where and in what manner he may or may not speak, write, assemble, and so on. On the other hand, he may not be told what he shall or shall not believe. In that realm each citizen is sovereign." Meiklejohn, *The First Amendment Is an Absolute*, 1961 S.Ct.Rev. 245, 257. For a more complete statement of the underlying argument, see Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 919-20 (1963).

This governing principle was refined in the freedom of religion cases; but it is equally applicable to the free speech and belief area. Mr. Justice White sensed the ubiquity of the principle when he dissented in *Welsh* v. *United States*, 90 S. Ct. 1792, 1813, "The [First] Amendment," he wrote, "protects belief and speech, but as a general proposition, the free speech provisions stop short of immunizing conduct from official regulation. The Free Exercise Clause has a deeper cut: it protects conduct as well as religious belief and speech. '[I]t safeguards the free exercise of the chosen form of religion. *Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute* but, in the nature of things, the second cannot be.' *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304 (1940)." (Emphasis added.) Numerous additional pronouncements of this Court make it perfectly clear that: "This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience," *Thomas* v. *Collins*, 323 U.S. 516, 531. "[T]he domains of conscience and belief," Justice Douglas has said, "have been set aside and protected from government intrusion . . . *What a man thinks is of no concern to government.*" *Speiser* v. *Randall*, 357 U.S. 513, 536 (concurring opinion) (emphasis added). See also, *Sweezy* v. *New Hampshire*, 354 U.S. 234, 266 (Frankfurter, J., concurring). In *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 412, the Court recognized the constitutional requirement that "one be permitted to believe what he will," and Mr. Justice Black, in dissent, noted that "[i]ndividual freedom and governmental thought-probing cannot live together." *Id.* at 446. See also *Brandenburg* v. *Ohio*, 395 U.S. 444, 450 (Douglas, J., con-

curring); *Schneider* v. *Smith*, 390 U.S. 17, 25; *Torcaso* v. *Watkins*, 367 U.S. 488, 495-96; *Watkins* v. *United States*, 354 U.S. 178, 198; *United States* v. *Rumely*, 345 U.S. 41; *Girouard* v. *United States*, 328 U.S. 61, 68; *Schneiderman* v. *United States*, 320 U.S. 118, 144.

The notion that the First Amendment reserved certain areas free from governmental inquiry was well-established long before the now famous exposition of the right of privacy in *Griswold* v. *Connecticut*, 381 U.S. 479. Articulated most forcefully by Justice Brandeis, dissenting in *Olmstead* v. *United States*, 277 U.S. 438, 478, the constitutional protection results because the "makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against government, the right to be let alone —the most comprehensive of rights and the right most valued by civilized men." In *Stanley* v. *Georgia*, 394 U.S. 557, 564-65, this Court recently adopted Justice Brandeis's statement, and declared that: "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."

Perhaps the most comprehensive decision to plumb the First Amendment dimension of this right to privacy is the celebrated Flag Salute case, *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624. "To sustain the compulsory flag salute," the Court said, in terms singularly appropriate here,

> ". . . we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not [or for that matter what is] in his mind." *Id.* at 634.

The Court below sought to justify just such compulsion on the ground that "[w]hat a person believes has a central effect on the views and actions taken by that person" and the State has a peculiarly high interest, particularly at the primary school level, in neutralizing "the potential for the exertion of the principles of violent overthrow as a way of life [by school teacher-believers] on the younger, inferior mind . . . [of public school students]" (Jt. App., p. 152) (305 F. Supp. at 453).

But this kind of reasoning cannot justify such a massive invasion of the appellant's First Amendment rights. As this Court has observed: "That they [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia State Board of Education* v. *Barnett*, 319 U.S. 624, 637. Precisely because of the sensitivity and vulnerability of the classroom this Court repeatedly has reaffirmed the principle that "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian* v. *Board of Regents of New York*, 385 U.S. 589, 603. See also, e.g., *Wieman* v. *Updegraff*, 344 U.S. 183; *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250; *Barenblatt* v. *United States*, 360 U.S. 109, 112; *Baggett* v. *Bullitt*, 377 U.S. 360, 369; *Whitehill* v. *Elkins*, 389 U.S. 54, 59-60; *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503.

Because the Florida loyalty statute and oath invades the protected province of a man's private political beliefs, they suffer fatal defects under the overbreadth doctrine, which has two components. A law is overbroad when it proscribes acts "which legitimately may be proscribed" as well as acts "which may not be proscribed." *Keyishian* v. *Board of Regents of New York*, 385 U.S. 589, 609; see also, e.g., *United States* v. *Robel*, 389 U.S. 258, 267-68; *Schneider* v. *Smith*, 390 U.S. 17, 24; *Elfbrandt* v. *Russell*, 384 U.S. 11. A law is also overbroad, in violation of the First Amendment, if some means less restrictive of the essential democratic interest in free communication is available for government to pursue its other subordinating or paramount interests. See, e.g., *United States* v. *Robel, supra; Shelton* v. *Tucker*, 364 U.S. 479, 488; *Schneider* v. *Smith, supra; United States* v. *O'Brien*, 391 U.S. 367, 376-77. The Florida loyalty statute and oaths suffer from both defects of overbreadth.

They are unconstitutional under the first aspect of the doctrine to the extent that they penalize mere beliefs rather than affirmative unlawful actions or at the very least advocacy which constitutes incitement to imminent unlawfulness. See, e.g., *Brandenburg* v. *Ohio*, 395 U.S. 444. In addition, they reach much too far in proscribing belief in "the overthrow of the Government of the United States or the State of Florida by force or violence" without regard to context. This overbreadth becomes all the more gross in light of the dispositive ruling by the highest court of Florida that this undertaking was designed "to prevent . . . employment of . . . employees who . . . subscribe to a doctrine of accomplishing a change in government by the employment of force and violence." *Cramp*

v. *Board of Public Instruction of Orange County*, 137 So. 2d 828, 830 (Fla. 1962). Cf., e.g., *Scales* v. *United States*, 367 U.S. 203; *Noto* v. *United States*, 367 U.S. 290; *Yates* v. *United States*, 354 U.S. 298.[7]

The Florida statute and oaths are unconstitutional under the second aspect of the overbreadth doctrine as well. The state cannot sustain its burden of demonstrating that no less restrictive means are available to accomplish its subordinating purpose.[8] The only paramount interests discovered by the District Court to justify imposition of this restriction were "the state's legitimate interest in educating youth and in the teaching of the principles of ordered government and the orderly process for change" (Jt. App. p. 152) (305 F. Supp. at p. 453). But this Court recently

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[7] In a Task Force Report submitted to the National Commission on the Causes and Prevention of Violence, Jerome Skolnick, Director of the Task Force, observes:

> "The proposition that domestic political violence has been unnecessary to achieve political goals is ambiguous, but it is historically fallacious no matter how one interprets it. If it means that the established machinery has permitted major 'out-groups' to move nonviolently up the politicoeconomic ladder, it is demonstrably false. . . .
>
> Similarly, the proposition is false if it means that the establishment is self-transforming, in that groups in power will always or generally share that power with newcomers without the pressure of actual or potential violence." Skolnick, *The Politics of Protest* 15-16 (Ballantine ed. 1969).

Could Mr. Skolnick conscientiously make this oath?

[8] If the State must demonstrate that it has even a reasonable chance of accomplishing its end through this kind of loyalty testing, it cannot prevail. Professor Emerson has aptly described this particular demonstration in futility: "The effort to suppress belief can rarely be successful. It cannot change opinions or substitute better ones. It affects chiefly those among the unorthodox who are men of principle and, by encouraging concealment and deception, destroys the whole basis of public morality." Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 919 (1963).

ruled that teachers who do not subscribe to "the principle of orderly government and the orderly process for change" (whatever that may mean) "may not be cast into the outer darkness." *Whitehill* v. *Elkins*, 389 U.S. 54, 57. Moreover, it is difficult to understand how these restrictions facilitate "educating youth" unless the District Court meant providing exposure (or is it indoctrination?) only to orthodox ideas.[9] Obviously, such an interest cannot survive

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[9] Fla. Stat. Ann §233.064 would indicate that the State's purpose was indoctrination and continued surveillance. (Cf. *Keyishian* v. *Board of Regents*, 385 U.S. 589):

"233.064 Americanism vs. communism; required high school course.—

"(1) The legislature of the state hereby finds it to be a fact that

"(a) The political ideology commonly known and referred to as communism is in conflict with and contrary to the principles of constitutional government of the United States as epitomized in its national constitution,

"(b) The successful exploitation and manipulation of youth and student groups throughout the world today are a major challenge which the free world forces must meet and defeat, and

"(c) The best method of meeting this challenge is to have the youth of the state and nation thoroughly and completely informed as to the evils, dangers and fallacies of communism by giving them a thorough understanding of the entire communist movement, including its history, doctrines, objectives and techniques.

"(2) The public high schools shall each teach a complete course of not less than thirty hours, to all students enrolled in said public high schools entitled 'Americanism versus communism.'

"(3) The course shall provide adequate instruction in the history, doctrines, objectives and techniques of communism and shall be for the primary purpose of instilling in the minds of the students a greater appreciation of democratic processes, freedom under law, and the will to preserve that freedom.

"(4) The course shall be one of orientation in comparative governments and shall emphasize the free-enterprise-competi-

(*continued on next page*)

First Amendment scrutiny. To the extent that state has an interest in assuring "the teaching of the principles of ordered government and the orderly process for change," surely it can do so without infringing upon contrary beliefs by some teachers or even limiting instruction to that principle as though it were immutable. And to the extent that the state has a legitimate interest in keeping teachers from indoctrinating grade school, secondary school, or college students with a contrary principle, the state can serve that interest without invading the First Amendment province of individual beliefs and advocacy. The state might

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tive economy of the United States as the one which produces higher wages, higher standards of living, greater personal freedom and liberty than any other system of economics on earth.

"(5) The course shall lay particular emphasis upon the dangers of communism, the ways to fight communism, the evils of communism, the fallacies of communism, and the false doctrines of communism.

"(6) The state textbook committee and the state board of education shall take such action as may be necessary and appropriate to prescribe suitable textbook and instructional material as provided by state law, using as one of its guides the official reports of the house committee on un-American activities and the senate internal security sub-committee of the United States congress.

"(7) No teacher or textual material assigned to this course shall present communism as preferable to the system of constitutional government and the free-enterprise competitive economy indigenous to the United States."

A provision included in the 1969 Florida General Appropriations Bill, prohibits any payment of appropriated monies for the benefit of any employee or student who advocates the overthrow of the federal or state government or a state university administration, by force and violence, or who willfully practices, or advocates with clear intent, the disruption of or interference with the lawful administration or functions of any state university or college. *See* Gonzalez, *State Laws of 1969 Dealing with Student Unrest* (Nov. 5, 1969. Mimeo. Nat'l Ass'n of State Universities and Land-Grant Colleges).

see to it that instruction is received in the principle of orderly government and processes;[10] conceivably, within very clear and strict limits, it might sanction purposeful and one-sided indoctrination of students in contrary principles.[11] Cf. *United States* v. *Robel*, 389 U.S. 258, 266-267.

B. *The Affirmative Loyalty Oath Validated by the Court Below Unconstitutionally Invades First Amendment Freedoms and Is Overbroad*

The second of the provisions upheld by the District Court requires applicants for public employment to "solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida." On its face this provision is similar to the oath of office prescribed in the United States Constitution, Art. II, §1, para. 8 and Art. VI, para. 3 (see *Bond* v. *Floyd*, 385 U.S. 116, 135-36), and to the affirmative oaths left standing by this Court in the recent New York and Colorado cases. *Knight* v. *Board of Regents*, 269 F. Supp. 339 (S.D.N.Y. 1967), *aff'd mem.*, 390 U.S. 36; *Hosack* v. *Smiley*, 276 F. Supp. 876 (D. Colo. 1967), *aff'd mem.*, 390 U.S. 744; *Ohlson* v. *Phillips*, 304 F. Supp. 1152 (D. Colo. 1969), *aff'd mem.*, 397 U.S. 317. Nevertheless, this Court should subject the Florida provision to plenary review and declare it to be in violation of the First Amendment.

Florida's affirmative loyalty oath, unlike others the Court may have considered, is "more than an amenity," *Cole* v. *Richardson*, 397 U.S. 238, 240 (Harlan, J. and Burger, C.J., concurring), it is not a mere symbolic and public declaration of fidelity to the Constitution. It is

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[10] See Fla. Stat. Ann. §233.064.

[11] Surely, Fla. Stat. Ann. §233.064(7) could *not* pass muster.

really a negative test oath masquerading as an affirmative oath of office. The statute which prescribes this oath reveals full well that it is an integral part of a comprehensive, repressive program designed to invade the privacy of the oathtaker's mind, and unconstitutionally to restrict his beliefs, utterances, and associational activities. This so-called oath of office is bracketed into a statute which on its face contained four additional negative test oath requirements, each of which unconstitutionally invaded First Amendments rights. The provisions of that statute (Fla. Stats. Ann. §§876.05-876.10) are themselves found in the middle of Chapter 876 of the Florida Statutes Annotated, which consists of 31 somewhat interrelated sections, each dealing with some aspect of "Criminal Anarchy, Communism, Wearing of Masks, Hoods, Etc." As the Supreme Court of Florida dispositively ruled:

> "The obvious legislative purpose in enacting the subject statute was to prevent the election or employment of public officials and employees who are knowingly disloyal to the government of the United States or to the State of Florida and who subscribe to the doctrine of accomplishing change in government by the employment of force and violence." *Cramp* v. *Board of Public Instruction of Orange County*, 137 So.2d 828, 830 (Fla. 1962).[12]

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[12] In *Elfbrandt* v. *Russell*, 384 U.S. 11, a putatively affirmative oath was given a similar negative gloss by the legislature and the State's highest court. This Court treated the oath as though it were a negative (or disclaimer) oath and declared it unconstitutional. On the other hand, the oath and provision in the latest Colorado case, *Ohlson* v. *Phillips*, 304 F. Supp. 1152 (D. Colo. 1969), *aff'd mem.*, 397 U.S. 317, for example, seem to have no disclaimer context or negative gloss.

Further the District Court upheld this remaining oath for precisely the same reasons it upheld the "belief" provision.

The single remaining oath provision should be read *in pari materia* with its neighboring provisions; it should be evaluated in that statutory context, not in isolation. Compare, e.g. *Keyishian* v. *Board of Regents,* 385 U.S. 589; *Whitehill* v. *Elkins,* 389 U.S. 54, *on remand,* 287 F. Supp. 61 (D. Md. 1968). When viewed in this context, the affirmative oath provisions must be voided for all of the reasons elaborated in the opinions of this Court, and in the District Court opinion striking down three of the "negative" clauses, and already suggested in this brief for striking down the fourth and remaining "negative clause". Compare *Richardson* v. *Cole,* 300 F. Supp. 1321 (D. Mass. 1969), *vacated and remanded for a determination of mootness,* 397 U.S. 238, in which an entire statute prescribing two oaths, one negative and the other affirmative, was voided although the court addressed only the unconstitutionality of the negative oath.

On the surface, this argument my seem to be inconsistent with the approach taken by this Court in *Ex parte Garland,* 71 U.S. (4 Wall.) 333. At issue in that case was an Act of Congress which prescribed a loyalty oath for attorneys in the following form:

> "1st. That the deponent has never voluntarily borne arms against the United States since he has been a citizen thereof;
>
> "2d. That he has not voluntarily given aid, countenance, counsel or encouragement to persons engaged in armed hostility thereto;
>
> "3d. That he has never sought, accepted or attempted to exercise the functions of any office what-

soever, under any authority or pretended authority in hostility to the United States;

"4th. That he has not yielded a voluntary support to any pretended government, authority, power or constitution, within the United States, hostile or inimical thereto; and,

"5th. That he will support and defend the Constitution of the United States against all enemies, foreign and domestic, and will bear true faith and allegiance to the same." 71 U.S. (4 Wall.) at 376.

The Court responded to this juxtaposition of affirmtive and negative provisions by declaring that: "This last clause is promissory only, and requires no consideration. The questions presented for our determination arise from the other clauses. These all relate to past acts." *Id.*

This decision is not controlling here. Garland was not pressing a First Amendment claim; he did not bridle at taking the oath because it invaded his rights to privacy and political freedom. He challenged the oath on the ground that it was a bill of attainder and an *ex post facto* law and invaded the President's pardoning power. Congress had established the requirement to bar adherents of the Confederacy from practicing law in the Courts of the United States. Garland had been a member of the Confederate legislature. Hence it was not for want of will, but for want of ability that he could not truthfully execute the negative oaths. The affirmative oath was within his power to execute. His argument and the Court's opinion, were focused entirely on the retrospective character of the disability. The promissory oath did not fit within the parameters of either the legal doctrines or the facts to

which they were being applied. Indeed, in terms of Garland's claim, the promissory oath was no disability at all.

The situation is quite different in the instant case. The appellant is not pursuing a bill of attainder or an *ex post facto* claim. Her claim is rooted in First Amendment. And especially when read with the negative disclaimers, the affirmative oath dangerously invades her privacy and her political freedom. The promissory character of the oath increases the danger to these rights, for it "would apply to future as well as past conduct." See *Cramp* v. *Board of Public Instruction of Orange County*, 137 So.2d 828, 830 (Fla. 1962). After all, "A 'violation' of . . . [a statute such as the present one], which presumably means a failure to 'live up' to the oath, since its phraseology is in the future tense, is a felony." [13] *Richardson* v. *Cole*, 300 F. Supp. 1321, 1322 (D. Mass. 1969), *vacated and remanded*, 397 U.S. 238; accord, 397 U.S. at 242 (Douglas, J., dissenting). Unless the promissory undertaking is both definite and narrow, its *in futuro* effect can place the oath-taker in criminal jeopardy for acts not forseeable at the time he takes the oath.[14] Such an oath cannot be consistent with the First Amendment and due process. See *Keyishian* v. *Board of Regents*, 385 U.S. 589, 601-02; *United States* v. *Robel*, 389

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[13] Fla. Stats. Ann. §876.10 punishes as perjury the making of false oaths. See *State* v. *Diez*, 97 So.2d 105 (Fla. 1957). On the significance of the perjury sanction, see *Elfbrandt* v. *Russell*, 384 U.S. 11; *Baggett* v. *Bullitt*, 377 U.S. 360, 373-74; *Georgia Conf. of AAUP* v. *Board of Regents*, 246 F. Supp. 553, 555 (N.D. Ga. 1965).

[14] *'Yet sworn word may strengthen quacking hearts'* said Gimli. *'Or break it'* said Elrand. *'Look not too far ahead! But go now with good hearts . . .'* TOLKIEN, LORD OF THE RINGS, Vol. I, p. 294 (2nd ed. 1967).

U.S. 258, 276; *cf. Marchetti* v. *United States*, 390 U.S. 39, 53, where the Court rejected " . . . the premise that the privilege [against self-incrimination] is entirely inapplicable to prospective acts. . . ."

In light of its statutory context, and gloss given to it by the Supreme Court of Florida,[15] the affirmative oath cannot possibly satisfy First Amendment requirements. Analyzed in this context, Florida's promissory oath requirement is the functional equivalent of the federal oath, recently declared unconstitutional, that "applies to one who advocates overthrow in the distant future, as well as in the present or near future." *Stewart* v. *Washington*, 301 F. Supp. 610, 612 (D. D.C. 1969).

C. *Indiscriminately Required Loyalty Oaths Unconstitutionally Abridge the Freedoms of Expression, Belief and Privacy*

The phrase "I do not believe in the overthrow of the government of the United States or of the State of Florida by force or violence" constitutes a negative loyalty oath. Beginning with the 1961 decision in *Cramp*, the predecessor of this case, each such test oath to come before this Court has been found to be in violation of the Frst Amendment. See *Cramp* v. *Board of Public Instruction of Orange County*, 368 U.S. 278; *Baggett* v. *Bullitt*, 377 U.S. 360; *Elfbrandt* v. *Russell*, 384 U.S. 11; *Keyishian* v. *Board of Regents*, 385 U.S. 589; *Whitehill* v. *Elkins*, 389 U.S. 54; *James* v. *Gilmore*, 389 U.S. 572, *affirming per curiam*, 274 F. Supp 75 (N.D. Tex. 1967). Further, the decision of the Court below is the only one, since this Court's ruling in the

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[15] *Cramp* v. *Board of Public Instruction of Orange County*, 137 So.2d 828, 830 (Fla. 1962), quoted *supra*, p. 24.

Whitehill case, by which a state or inferior federal court upheld a negative loyalty oath (or authorizing statute) for public employees. Compare, e.g., *Vogel* v. *County of Los Angeles*, 68 Cal.2d 18, 434 P.2d 961, 64 Cal. Rptr. 409 (1967); *Whitehill* v. *Elkins*, 287 F. Supp. 61 (D. Md. 1968); *Haskett* v. *Washington*, 294 F. Supp. 912 (D. D.C. 1968); *Stewart* v. *Washington*, 301 F. Supp. 610 (D. D.C. 1969); *Thalberg* v. *Board of Trustees of the Univ. of Illinois*, 309 F. Supp. 630 (N.D. Ill. 1969).[16]

All such disclaimers or negative loyalty oaths, cast in political terms, offend the First and Fourteenth Amendments' freedoms of expression, belief, and privacy. Even the clearest and most precise disclaimer imaginable would be unconstitutional, particularly when demanded indiscriminately of all government employees or beneficiaries.

Such disclaimers are classical test oaths, relics of times when the individual stood not as citizen, but as servant or chattel, of the state or sovereign. Historically, these disclaimers have been particularly distasteful to Americans. Asper, *The Long and Unhappy History of Loyalty Testing in Maryland*, 13 Am. J. Leg. Hist. 97 (1969); Hyman, To Try Men's Souls (1960). Unlike affirmative declarations to support the Constitution, they have no textual basis in that document. Compare U.S. Const. Art II, §1; Art. VI, para. 3. See *Bond* v. *Floyd*, 385 U.S. 116; *Stewart* v. *Washington*, 301 F. Supp. 610, 612 (D. D.C. 1969).

"Our Constitution contains a specific provision recoiling from the odious test oaths that emerged in Britain in the 17th century, and which disqualified from pub-

[16] But cf. *Law Students Civil Rights Research Council, Inc.* v. *Wadmond*, 299 F. Supp. 117, 125-27 (S.D.N.Y. 1969), *probable juris. noted*, 396 U.S. 999.

lic office all Catholics and non-conformists not subscribing to the doctrines of the Church of England. That provision is Article VI which provides: 'No religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.'" *Stewart* v. *Washington*, 301 F. Supp. at 611.

Loyalty disclaimers are especially incidious in that they put the oath-taker to the odious and impossible task of declaring or demonstrating a negative—that he is *not*, in effect; disloyal. See *Bently Glass on Test Oaths*, 46 AAUP Bull. 290-291 (Autumn 1960). They place burdens of persuasion and proof on the oath-taker. They are formulated in such a way as to presume the guilt and disloyalty of all persons. Only if the affiant comes forward and executes the expurgatory oath may he become a member of the favored group. In other words, disclaimers presume disability and then shift to the affiant the burdens of going forward, cf. *Lamont* v. *Postmaster General*, 381 U.S. 301, and of proof and persuasion, see *Speiser* v. *Randall*, 357 U.S. 513. Such a procedure derogates the First Amendment, see *Elfbrandt* v. *Russell*, 384 U.S. 11, 17-18; cf. e.g., *Schneider* v. *Smith*, 390 U.S. 17, 27 (Fortas, J., concurring), as reinforced by the Fifth Amendment's privilege against self-incrimination, see, e.g., *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70; cf. e.g., *Garrity* v. *New Jersey*, 385 U.S. 493; *Spevak* v. *Klein*, 385 U.S. 511.

Indiscriminate test oaths, like those required by the State of Florida, especially violate important First Amendment principles. This Court has made it unmistakable that before response can be required to political inquiries the government must meet a heavy burden of demonstrating the

relevance of its questions. Cf. *Gojack* v. *United States*, 384 U.S. 702; *DeGregory* v. *Attorney General*, 383 U.S. 825; *Gibson* v. *Florida Legislative Investigative Committee*, 372 U.S. 539. And it may not, as the Florida oath does, make an inquiry "which blankets all . . . employees, regardless of the 'sensitivity' of their positions." *Keyishian* v. *Board of Regents*, 385 U.S. 589, 607; accord, *United States* v. *Robel*, 389 U.S. 258.

The principles to be applied, in evaluating both "appropriateness" of the inquiries (or oaths) and the "sensitivity" of position, are well established. First, "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Bates* v. *City of Little Rock*, 361 U.S. 516, 524. Second, "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker*, 364 U.S. 479, 488.

In recently passing upon inquiries required pursuant to a federal loyalty-security program, Justice Douglas declared that in *Shelton* "we held that an Act touching on First Amendment rights must be narrowly drawn so that the precise evil is exposed . . . ." *Schneider* v. *Smith*, 390 U.S. 17, 24 (1968); see also *id.* at 27-28 (concurring opinion). And in *United States* v. *Robel*, 389 U.S. 258, 267-68 (1967), it was squarely held with respect to a federal loyalty-security provision that:

> "Our decision today simply recognizes that, when legitimate legislative concerns are expressed in a stat-

ute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms."

Again, in *Keyishian v. Board of Regents*, 385 U.S. 589, 609 (1967), the Court invalidated a state restriction on the public employment of members of the Communist Party where the restriction applied even to persons neither actively engaged in any of the Party's illegal objectives nor shown to harbor a specific intention of supporting such objectives by unlawful conduct:

> "They [the invalid state laws] seek to bar employment both for association which legitimately may be proscribed and for association which may not be proscribed consistently with First Amendment rights. Where statutes have an overbroad sweep, just as where they are vague, 'the hazard of loss or substantial impairment of those precious rights may be critical,' *Dombrowski v. Pfister, supra,* [380 U.S. 479] at 486, since those covered by the statute are bound to limit their behavior to that which is unquestionably safe."

Compelled extraction of the Florida text oath from all employees and applicants for appointment cannot survive the tests of "appropriateness" of inquiry and "sensitivity" of position. They impose, with neither necessity nor justification, too substantial a burden on First Amendment rights. First, the oaths and limitations at issue here are not appropriate to the qualifications of all conceivable kinds of government employees; and the vast majority of the positions to be filled are not security sensitive. Cf.

Cole v. *Young*, 351 U.S. 536. Second, the government has means less stultifying to First and Fifth Amendment rights to achieve any subordinating interest. It may make it a criminal offense to engage in acts designed to overthrow the government by force or violence. It may even punish conspiracies to engage in such acts, and may require the terminal discharge of employees who knowingly commit acts in furtherance of any such conspiracy. It may not, however, broadly curtail the freedom of association, speech and assembly of all its employees because of an overzealous concern with the possibility of such unlawful conspiracies. See *DeJonge* v. *Oregon*, 299 U.S. 353, 365-66.

Appellant submits that Florida's indiscriminate requirement of the affirmative loyalty oath is subject to the same First Amendment tests as is the disclaimer. But see *Knight* v. *Board of Regents*, 390 U.S. 36; *Hosack x. Smiley*, 390 .U.S. 744; *Ohlson* v. *Phillips*, 397 U.S. 317. Except where constitutionally mandated, expressly or by fair implication, all affirmative oaths are constitutionally suspect. They are really variations on the theme of the classical test oath.

Sometimes they are used, much to the detriment of our political society, unjustifiably to single out individuals or groups to test their loyalty. Professor Asper reported that members of the Maryland legislature, who were imprisoned arbitrarily at the start of the Civil War, were required to execute a test oath as the condition to their release.

> "For the stubborn Marylanders this was entirely a matter of principle. The oath tendered to them was, in present day terminology, an 'affirmative' oath.

> They were not asked to disavow any past actions, sympathies or beliefs. They were asked simply to promise to support and defend the Constitution of the United States. What they objected to was being singled out as objects of suspicion. They challenged the power of the government to pick them out and demand that they stand before the rest of the community and 'prove' their loyalty by swearing to a special oath. This they regarded as an affront to their integrity and their standing as free citizens." Asper, *The Long and Unhappy History of Loyalty Testing in Maryland*, 13 AM. J. LEG. HIST. at 104.

Affirmative oaths are equally harmful when they are required indiscriminately, say of all government employees, without any relation to substantive governmental needs. The symbolic role played by the oaths of office mandated in the federal Constitution for high government officials becomes attenuated to the point of irrelevance when all employees, not just officers, of the government are compelled to swear the oath. Such oaths, even when cast as simply as the Florida oath, are used, like disclaimers, for purposes of repression. As we have demonstrated, Florida's affirmative oath is really a disclaimer in this disguise. See, *supra*, pp. 9-10 n. 3. This was no accident. It is in the nature of the indiscriminate affirmative oath.[17]

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[17] This Court, and other courts, have passed upon many such oaths that were not so subtly disguised. See *Elfbrandt* v. *Russell*, 384 U.S. 11; *Baggett* v. *Bullitt*, 377 U.S. 360; *Richardson* v. *Cole*, 300 F. Supp. 1321 (D. Mass. 1969), *vacated and remanded*, 397 U.S. 238; *Pedlosky* v. *Massachusetts Institute of Technology*, 352 Mass. 127, 224 N.E.2d 414 (1967); *Gallagher* v. *Smiley*, 270 F. Supp. 86 (D. Colo. 1967).

"Resistance to . . . [test oaths] is incomprehensible to many citizens," reported Professor Asper:

> "The question, 'Why a loyalty oath?' invariably brings the response, 'Why not? What harm can it do? If one is not a subversive person or is not a member of a subversive organization, why should he object to signing a piece of paper attesting to that fact?'" Asper, *The Long and Unhappy History of Loyalty Testing in Maryland*, 13 AM. J. LEG. HIST. 97, 97-98 (1969).

The answers are obvious enough:

> "The long history of loyalty testing . . . demonstrates that . . . [it] has a capacity for self-nourishment; that it may grow fortuitously and arbitrarily, at times providing a mask for the most disagreeable instincts and prejudices. It is a political weapon susceptible to cynical uses and, so used, may create suspicion, ill-feeling and ugliness among citizens and neighbors. Finally, the doleful fact is that loyalty testing, more often than not, punishes persons who place a high value on personal integrity and individual rights while failing entirely to apprehend those who would injure the society it purports to protect." *Id.* at 98; see also, e.g., Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 919-920, 942 (1963); R. O'NEIL, THE PRICE OF DEPENDENCY 87-88 (1970); *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 445-453 (Black, J. dissenting).

The facts in this case, and the companion case (*Adams* v. *O'Connell*), demonstrate the point. Appellant who was hired to be a teacher; she functioned satisfactorily in that

capacity. She had been in the classroom for more than a week before she was put to her loyalty test. The test first imposed upon her had been declared unconstitutional by this Court eight years earlier. Because she would not execute the oath, or one that was modified, she was discharged—denied her pay and entry to the classroom.

The plaintiffs in the *Adams* case were personnel of the University of Florida. On October 16, 1969, nearly two months after the academic year had commenced, the President of the University required each employee of the University to execute a loyalty oath, regardless of whether or not his personal file already contained a valid oath. The purpose of this demand was "to insure that each personnel file contains a loyalty oath that is properly worded and notarized as required by the Florida Statutes . . ." App., *infra*, p. 20a. The plaintiffs sued rather than execute this oath. The Court below upheld the suit but validated so much of the oath as is at issue here. Three persons who declined to execute the judicially amended oath were discharged and denied their pay.

Real interests are at stake in this case. Real interests are always at stake when the state seeks to impose loyalty tests. See, generally, Mr. Justice Black's dissenting opinion in *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 445-453. People can lose jobs; they can lose benefits; they can lose property. Frequently, the interests are even greater than the right to hold a job or to receive one's pay. Frequently, a man's life or physical liberty is at stake. See generally, Asper, *supra*, 13 Am. J. Leg. Hist. 97.

If we put aside the material injuries that can result to people because of text oath requirements, the oath itself

is probably not a significant matter. The words may be few and recitation may not be onerous. The non-psychological burdens on the individual are not great; they are no greater, perhaps, than those resulting from compulsion to salute the flag or to recite a prayer in public school. See *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624; *School District of Abington Township* v. *Schempp*, 374 U.S. 203. By the same token, the state's substantive gain from the imposition of a test oath is negligible. No subversive or disloyal person will chaff at a test oath. See, e.g., *Bently Glass on Test Oaths, supra;* Asper, *supra;* Emerson, *supra.* They will not be screened out in this fashion; especially since at the time the oath is taken the state is "not authorize[d] . . . to test the sincerity with which" it is taken. *Bond* v. *Floyd*, 385 U.S. 116, 132. The test oath is, like the yellow dog contract, designed not to entrap or screen-out but to humiliate.

The issue of the test oath tends to refine itself to the vanishing point; it becomes a contest between the state and the citizen over something that, in and of itself, has no substantive importance. It is like the Battle of Pork Chop Hill, which was fought at the close of the Korean War, or the battle of Hamburger Hill recently fought in Viet Nam. The hill itself was unimportant. The battle became a pure contest over each side's resolve, power and principle. How much was each side willing to expend over something which itself lacked intrinsic worth? Thus the test oath controversy can be seen as a contest between the state and the citizen, and it concerns the fundamental freedoms.[18] The issue is clear: How free may the citizen insist upon being, even about matters that are unimpor-

[18] Cf. e.e. cummings' poem "i sing of Olaf glad and big."

tant; and how much irrelevant restraint may the state impose upon him."[18a]

Appellant submits that the citizen should win this contest. Justice Jackson's formulation of the controlling principle cannot be improved upon:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642. See also, Mr. Justice Black's dissenting opinion in *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 445-53.

POINT II

On their face and as applied, Florida's two statutory and oath provisions, which were left standing by the Court below, violate the Due Process clause of the Fourteenth Amendment in that they are unduly vague and provide no opportunity for clarification hearing or procedure.

A "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally* v. *General Construction Co.*, 269 U.S. 385,

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[18a] The philosophical absurdity of the contest, and the State's lack of a real reason to require test oaths, is well revealed in Joseph Heller's remarkable novel, CATCH-22 (1961), pp. 110-116.

391; *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453; *Winters* v. *New York*, 333 U.S. 507, 515. Indefinite oath statutes have a special vice. Not only are they impermissibly vague, but in their vagueness they "abut upon sensitive areas of basic First Amendment freedoms. The uncertain meanings of the oaths require the oath-taker . . . to 'steer far wider of the unlawful zone,' *Speiser* v. *Randall*, 357 U.S. 513, 526 . . . , than if the boundaries of the forbidden area were clearly marked." *Baggett* v. *Bullitt*, 377 U.S. 360, 372. Imprecision in an oath "makes possible oppressive or capricious application as regimes change."[19] These further aggravations of the vice of vagueness demand application of the strictest standard, lest the free dissemination of ideas be the loser. E.g., *Cramp* v. *Board of Public Instruction of Orange County, supra*, 368 U.S. at 287; *Smith* v. *California*, 361 U.S. 147, 151; *Whitehill* v. *Elkins*, *supra*.

Certainly the gloss, placed upon the statute and the oaths, by the Supreme Court of Florida, 137 So.2d at 830, quoted in full *supra* at p. 24, reveals substantial problems of vagueness. The oath-taker cannot reasonably know what is meant by the requirement that he be "knowingly loyal to the government of the United States or to the State of Florida . . . " What does loyal mean? Must he be loyal to the form of government or to the officials who at any given time may comprise the government? If he vocally disagrees with the Chamber of Commerce image of Florida as a citrus and vacation paradise, is he being disloyal "to the State of Florida"?

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[19] *Whitehill* v. *Elkins*, 389 U.S. 54, 62; see also, *Baggett* v. *Bullitt*, 377 U.S. 360, 373; *NAACP* v. *Button*, 371 U.S. 415, 432-433; *Cramp* v. *Board of Public Instruction of Orange County*, 368 U.S. 278, 286-287.

The oath-taker also cannot know what is meant by the requirement that he not "subscribe to the doctrine of accomplishing a change in government by the employment of force and violence." What does it really mean to subscribe? What is meant by a change? Does this mean that the oath-taker must believe "that domestic violence has been unnecessary to achieve political goals . . . ? Compare Skolnick, *The Politics of Protest* 15-16 (Ballantine ed. 1969) quoted in full, p. 20 n. 7.

It is impossible to know what is meant by the declaration "I do not believe in the overthrow of the Government . . . by force or violence."[20] Initially, the oath-taker does not know what the statute and oath contemplate by "believe in." Does it include speculative or tentative belief? Commitment to the policy of violent overthrow? Approval of violent overthrow or violent political acts, under any or all circumstances? See Skolnick, *supra*, p. 20 n. 7. As already noted, it is not at all clear that government may proscribe or scrutinize these or any other such beliefs *qua* beliefs. Even if beliefs can be restricted with sufficient certainty, an oath-taker does not know what is contemplated by the phrase "overthrow of the Government." Does this mean an individual may not believe in the violent overthrow

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[20] Compare *Keyishian* v. *Board of Regents*, 385 U.S. 589, 593, voiding for vagueness the phrase, "utterance of any treasonable or seditious act"; *Baggett* v. *Bullitt*, 377 U.S. 360, 371-72, voiding as vague the phrase "respect for the flag and institutions of the United States . . . and undivided allegiance to the government of the United States"; *Gallagher* v. *Smiley*, 270 F. Supp. 86 (D. Colo. 1967, invalidating as vague an oath requiring teachers to promise that they will "teach, by precept or example, respect for the flags of the United States and of the state of Colorado, respect for law and order and undivided allegiance to the government of one country, the United States of America". See Colo. Rev. Stat. 1963, ch. 123, art. 17, §§6-8.

of a tyrannical government that has come to power by unlawful and violent means and has suspended or discarded the Constitution? If not, what does it mean? Cf. *Richardson* v. *Cole*, 300 F. Supp. 1321 (D. Mass. 1969) *vacated and remanded*, 397 U.S. 238, voiding for vagueness a loyalty statute containing the phrase "I will oppose the overthrow of the government . . . "

Particularly when viewed in the context of the total statute, as Judge Simpson recognized dissenting below, the requirement that a public employee must swear to "support the Constitution of the United States and the State of Florida" is also so vague that few persons of common intelligence will agree upon the obligations which the oath imposes. The range of activities which might reasonably be deemed to be inconsistent with the affirmative oath, in its negative statutory context, is so broad in scope that a conscientious affiant could reasonably fear that he is asked to refrain from unascertainable areas of constitutionally protected speech and assembly. It is possible, for example, that the phrase "support the Constitution" may mean the avoidance of any categorically direct violation. Perhaps, more plausibly, the phrase requires avoidance of open and active criticism of the form of government established by the Constitution or of any advocacy to overthrow the government. If such is the meaning of the phrase, the statute purports to proscribe activities which include constitutionally protected speech. This Court has clearly ruled that not all advocacy, but only advocacy constituting incitement to imminent lawlessness, may be proscribed or limited by government. See, e.g., *Brandenburg* v. *Ohio*, 395 U.S. 444; *Yates* v. *United States*, 354 U.S. 298; *Noto* v. *United States*, 367 U.S. 290. At the very least, the term, if it has

any meaning at all in this context, proscribes "alteration of . . . the constitutional form of government of the United States" and the State of Florida, a compulsory undertaking which this Court recently held to violate the Constitution. *Whitehill* v. *Elkins*, 389 U.S. 54, 57.

The vices which prompted this Court to strike down oaths and statutes in *Speiser, Cramp, Baggett, Elfbrandt, Keyishian,* and *Whitehill, supra,* are all present in the Florida statute and affirmative oath. The conscientious teacher who takes the oath cannot but be deterred from exercising First Amendment rights guaranteed to him by the very Constitution he has sworn to support. The oath, in this statutory context, must fall because teachers "of character and integrity may well forgo their calling rather than risk prosecution for perjury or compromise their commitment to intellectual and political freedom. . . ." *Elfbrandt* v. *Russell*, 384 U.S. 11, 18. The oath and statute must fall because: "We are in the First Amendment field. The continuing surveillance which this type of law places on teachers is hostile to academic freedom." *Whitehill* v. *Elkins*, 389 U.S. 54, 59-60.

The danger of vagueness in the Florida oath requirements is magnified by the fact that the statute provides for no mechanism by which the oath-taker may receive clarification of the oath. Under Fla. Stats. Ann. §§876.05-876.10, the prospective employee for whom negotiations are complete, save for the oaths (as was the case of the appellant), is given no opportunity to prove his loyalty or explain his reasons for refusing to sign the oaths. If he fails to sign at such a late stage, not only does he forfeit a position for which he is otherwise qualified or forfeit pay for work performed, but even more seriously, he suffers the

stigma of having balked at the oath, however scrupulous may have been his reasons.[21] This is precisely the situation in which the Appellant, and the plaintiffs in *Adams*, find themselves. The absence of such a procedure is equally harsh on the prospective employee who discovers the oath early in his quest for a government position; after such a discovery, he is unlikely to reach the stage at which he could even challenge the constitutionality of the oath requirement, as the appellant has done here. As Judge Wright suggested in a case very similar to the one under review, "I believe that such a result is inconsistent with the rigorous due process standards which govern the regulation of speech and association." *Haskett* v. *Washington*, 294 F. Supp. 912, 916 (D. D.C. 1968) (concurring opinion).[22]

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[21] There are many reasons, including conscientious objection (see e.g. *Torcaso* v. *Watkins*, 367 U.S. 488; *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624), why one might balk at taking such oaths. See also, e.g., *Aptheker* v. *Secretary of State*, 378 U.S. 500, 511-12; *Baggett* v. *Bullitt*, 377 U.S. 360, 367-70; *Keyishian* v. *Board of Regents*, 385 U.S. 589, 600-01. As the facts in *Adams* v. *O'Connell* demonstrate, App., *infra*, p. 15a, an employee might even object to taking the oath because he had already properly executed it. See *O'Connell* Memorandum (Oct. 16, 1969), App., *infra*, pp. 20a-21a.

[22] This due process defect is part and parcel of the vagueness doctrine. Mr. Justice Brennan's concurring opinion in *United States* v. *Robel*, 389 U.S. 258, 269, provides one of the most recent full dress analysis of the vagueness doctrine, when isolated from the overbreadth doctrine. His analysis matches the Court's positions in *Interstate Circuit* v. *City of Dallas*, 390 U.S. 676, 684-85 and *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147. It demonstrates that when an allegation of vagueness is made in a complaint, it is taken to include lack of procedural safeguards. As Justice Brennan suggested, a vague statute has one or a combination of three deficiencies. "First . . . [a] failure to provide adequate standards . . . [which] reflects Congress' failure to have made a 'legislative judgment' . . . ." 389 U.S. at 275. "Second . . . [A failure to] take steps to assure, 'respect for constitutional

Such indications as we have in this Court's decisions are to the effect that due process requires some type of hearing before a non-signer may be disqualified solely because he will not sign a required oath. Cf. *Speiser* v. *Randall*, 357 U.S. 513; *Lamont* v. *Postmaster General*, 381 U.S. 301. Recent decisions of the Court point the way to a guarantee for the prospective employee who risks the stigma of a non-signer. *Slochower* v. *Board of Higher Education*, 350 U.S. 551, is particularly apposite. There the Court refused to permit New York to draw an automatic inference of disloyalty from an employee's invocation of the Fifth Amendment privilege against self-incrimination. *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, and *Konigsberg* v. *State Bar of California*, 353 U.S. 252, extended a comparable protection to applicants for admission to the bar who were suspected of disloyalty because of their refusal to disclose certain past associations.[23]

On the basis of these precedents, a three-judge federal district court found Idaho's loyalty oath unconstitutional because it afforded no procedure by which the non-signer might explain his actions and vindicate his loyalty. *Heckler* v. *Shepard*, 243 F. Supp. 841, 845 (D. Idaho 1965).

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liberties' by preventing the existence of 'a wide gulf between the responsibility for the use of . . . power and the actual exercise of that power.' Procedural protections to avoid that gulf have been recognized as essential when fundamental freedoms are regulated." *Id.* at 277-78. "Third. The indefiniteness of the delegation . . . also results in inadequate notice to affected persons." *Id.* at 281.

[23] In recent cases concerning control of obscenity, the Court has also stressed the importance of hearings when First Amendment rights may be jeopardized by government action. See *Freedman* v. *Maryland*, 380 U.S. 51; *A Quantity of Books* v. *Kansas*, 378 U.S. 205; *Bantam Books* v. *Sullivan*, 372 U.S. 58; *Marcus* v. *Search Warrant*, 367 U.S. 717.

The provisions in the instant case are constitutionally vulnerable on just this ground. As developed also in *Slochower,* to draw an inference of disloyalty and disqualification from an unexplained refusal to sign—and without even affording an opportunity to explain—deprives the applicant of due process of law in the most basic sense. Thus, the instant loyalty oath scheme is procedurally as well as substantively deficient. See also, *Speiser* v. *Randall,* 357 U.S. 513; *Haskett* v. *Washington,* 294 F. Supp. 912, 918 (D. D.C. 1968) (concurring opinion).

POINT III

The Court below erred in ruling that some portions of the Florida statute and oath were severable from the unconstitutional portions.

When reviewing the constitutionality of state statutory provisions, as a matter of course the federal courts resolve questions of severability. See *Dorchy* v. *Kansas,* 264 U.S. 286, 291; *Williams* v. *Standard Oil of Louisiana,* 278 U.S. 235. It is also settled that the federal courts are obligated to apply the severability rules of the state. See, e.g., *Morey* v. *Doud,* 354 U.S. 457, 470 n. 16; *Reitz* v. *Mealey,* 314 U.S. 33, 38-39; *In re Wisconsin Builders Supply Co.,* 239 F.2d 649, 656-657 (7th Cir. 1956), *cert. denied,* 353 U.S. 985.

The Florida rules on severability have been articulated by the Florida Supreme Court:

> "The rule is well established that the unconstitutionality of a portion of a statute will not necessarily condemn the entire act. When a part of a statute is

declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken." *Cramp* v. *Board of Public Instruction of Orange County*, 137 So.2d 828, 830 (Fla. 1962); see also *Small* v. *Sun Oil Co.*, 222 So.2d 196, 199 (Fla. 1969).

The Court below did not apply the Florida rules of severability in this case. From its citation of this Court's decision in *United States* v. *Jackson*, 390 U.S. 570, 585, it seems to have applied its own inaccurate understanding of the federal rule, which it suggested required a statute to "be construed as severable where it is possible to interpret its provisions as distinct and to assume that legislature would have enacted the provisions separately." (Jt. App. p. 147) (305 F. Supp. at 430)

Accurately enough, on the other hand, the Court below observed that "this very statute has been said to be severable." *id.* In fact, after this Court's 1961 decision in *Cramp*, the case was remanded to the Supreme Court of Florida. The Florida Court ruled that this Court had declared only one phrase in the oath and statute unconstitutional: "... that I have not [lent] and will not lend my aid, support, advice, counsel or influence to the Communist

Party . . ." Applying Florida rules of severability, it then held that the void provision was severable from the statute and oath, and all else remained in force. 137 So.2d 828 (Fla. 1962).

However, since it is now clear that not just one but between three or four or five of the five operative provisions of the oath and the statute are unconstitutional, the severability issue must be considered anew. Obviously if, as appellant has contended, all of the operative provisions are unconstitutional, the entire statute (§§876.05-876.10 Fla. Stats. Ann.) should be voided. The five sections of the statute are concerned solely with the loyalty oaths and their enforcement; they have no other reason to exist. Compare *Whitehill* v. *Elkins*, 287 F. Supp. 61 (D. Md. 1968) (on remand from the Supreme Court). But even if one or two of the operative clauses were considered to be constitutional if enacted alone, the entire statute and oath still should be declared unconstitutional. So little would remain of the scheme enacted by the legislature that: "We have no way of knowing whether the Legislature would have enacted . . . [it] without the provision[s] which we conclude to be invalid. We are unable to decide that these provisions are separable." *Pedlosky* v. *Massachusetts Institute of Technology*, 352 Mass. 127, 224 N.E.2d 414, 416 (1967). Accord, *Richardson* v. *Cole*, 300 F. Supp. 1321 (D. Mass. 1969), *vacated and remanded*, 397 U.S. 238; *Whitehill* v. *Elkins*, 287 F. Supp. 61 (D. Md. 1968).

Even under Florida law it is well settled that, when the valid and invalid portions of a statute are inextricably intertwined, connected and interdependent in subject mat-

ter and purpose, the presumption that the legislature would have passed one portion without the others is precluded. Indeed, the conclusion is compelled that the legislature would not have done so. See 2 Sutherland, *Statutory Construction*, Sections 2418, 2407, 2404 (3rd Ed., 1943), especially if the statute embodies criminal or penal provisions, *id.* Section 2418.[24] . .

The Florida statute, §§876.05-876.10 is such an interwoven and comprehensive whole. The entire statute and the entire oath are void, therefore, even if portions might have been valid had they been enacted separately. The Florida Supreme Court has, in effect, so ruled. On remand in *Cramp*, the Florida Supreme Court declared:

> "The obvious legislative purpose in enacting the subject statute was to prevent the election or employment of public officials and employees who are knowingly disloyal to the government of the United States or to the State of Florida and who subscribe to the doctrine of accomplishing a change in government by the employment of force and violence. In this regard we have examined the legislative recitals included in the enactment of Chapter 25046, Laws of Florida, 1949, which was the original act that prescribed the loyalty oath in question. There can be no doubt that the legislative intent was primarily directed to the accomplishment of the objective which we have epitomized." 137 So.2d at 830. See also *Connell* v. *Higginbotham*, 305 F. Supp. at 450.

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[24] On severability generally see Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76 (1937).

The Florida Supreme Court, to be sure, also declared that:

> "There can likewise be little doubt that regardless of the invalid language the Florida Legislature would have enacted into law the remainder of the statute. The elimination of the subject language would leave intact a valid, coherent, workable statute. The invalid language did not so permeate or saturate the remainder of the act as to make it impossible to enforce the remaining valid portions after the elimination of those which are invalid. We, therefore, hold that when the portion of the statute declared unconstitutional by the Supreme Court is eliminated, the balance of the act should and does remain in full force and effect." 137 So.2d at 830-31.

But the State of Florida cannot have it that way any longer. It is hoist on its own petard! The gloss placed on the statute by the state's Supreme Court is controlling, as to the statute's meaning and scope. According to that gloss the statute is a unitary, interwoven whole. It must stand or fall as a unitary, interwoven whole—at least after a majority of its provisions have been declared unconstitutional. If it is not so interwoven, then the remaining provisions lack meaning or independent standing and must fall anyway.

Even if the entire statute is not void for lack of severability, it is still unconstitutional *in toto*. The purpose of the statute, each clause, each provision, is now clear. It was designed "to prevent the election or employment of public officials and employees who are knowingly disloyal to the government of the United States or to the State of Florida

and who subscribe to the doctrine of accomplishing a change in government by the employment of force and violence." 137 So.2d at 830. As this brief demonstrates, such a purpose clearly violates the First Amendment and the Fourteenth Amendment's due process clause.

Hence the judicial gloss on the statute has poisoned the whole and each of its parts. It must now be struck down in its entirety.

CONCLUSION

Since 1961 this Court, and the nation's other courts, have consistently voided loyalty oaths and statutes such as the ones at issue in this case. This case, the direct descendant of the *Cramp* case, provides the Court with an opportunity to settle finally the constitutional controversy over test oaths, and to evaluate an affirmative oath in a negative context. For the reasons set forth in this brief, the Court should declare Florida's remaining loyalty oaths and statutes unconstitutional; and further should declare all such test oaths to be interdicted.

Respectfully submitted,

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August 1970

[25] We are indebted to Nicholas Waranoff, a student in his final semester at the New York University School of Law, for his assistance in preparing this brief.

United States Constitutional Provisions Involved

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes

876.05 *State employees; oath.*—

(1) All persons who now or hereafter are employed by or who now or hereafter are on the payroll of the state, or any of its departments and agencies, subdivisions, counties, cities, school boards and districts of the free public school system of the state or counties, or institutions of higher learning and all candidates for public office, are hereby required to take an oath before any person duly authorized to take acknowledgments of instruments for public record in the state in the following form:

I, ..., a citizen of the State of Florida and of the United States of America, and being employed by or an officer of ..... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence.

(2) Said oath shall be filed with the records of the governing official or employing governmental agency prior to

the approval of any voucher for the payment of salary, expenses, or other compensation.

History.—Comp. §1, ch. 25046, 1949.

Note.—See 7 L.Ed. 2d 285 and 137 So. 2d 828 as to constitutionality of section.
cf.—§90.01, Oaths, requirements.

876.06 *Discharged for refusal to execute.*—If any person required by §§876.05-876.10 to take the oath herein provided for fails to execute the same, the governing authority under which such person is employed shall cause said person to be immediately discharged, and his name removed from the payroll, and such person shall not be permitted to receive any payment as an employee or as an officer where he or she was serving.

History.—Comp. §2, ch. 25046, 1949.

876.07 *Persons giving aid, advice, etc., to communist party.*—Any person having taken the oath provided for in §876.05 and who thereafter should become a member of the communist party or who lends aid, support, advice, counsel or influence to the communist party or who expresses any belief in or advocates the overthrow of the government of the United States or of the state by violence or force or thereafter becomes a member of an organization or party which believes in or teaches directly or indirectly the overthrow of the government of the United States or of the state by force or violence, shall immediately be discharged from his employment by the employing authority and his name shall be removed from the payroll, and thereafter such person shall not be permitted to receive any payment as an employee or an officer where he or she then was serving. Any person seeking to qualify for public office who fails or refuses to file the oath required by this act shall be held to have failed to qualify as a candidate for

public office, and the name of such person shall not be printed on the ballot as a qualified candidate.

History.—Comp. §3, ch. 25046, 1949.

876.08 *Penalty for not discharging.*—Any governing authority or person, under whom any employee is serving or by whom employed who shall knowingly or carelessly permit any such employee to continue in employment after failing to comply with the provisions of §§876.05-876.10, shall be guilty of a misdemeanor and shall be punished by a fine not exceeding five hundred dollars or by imprisonment not exceeding six months or by both fine and imprisonment.

History.—Comp. §4, ch. 25046, 1949.

876.09 *Scope of law.*—

(1) The provisions of §§876.05-876.10 shall apply to all employees and elected officers of the state, including the Governor and constitutional officers and all employees and elected officers of all cities, towns, counties and political subdivisions, including the educational system.

(2) This act shall take precedence over all laws relating to merit, and of civil service law.

History.—Comp. §§5, 7, ch. 25046, 1949.

876.10 *False oath; penalty.*—If any person required by the provisions of §§876.05-876.10 to execute the oath herein required executes such oath, and it is subsequently proven that at the time of the execution of said oath said individual was guilty of making a false statement in said oath, he shall be guilty of perjury, and shall be prosecuted and unished for the crime of perjury in the event of conviction. punished for the crime of perjury in the event of conviction.

History.—Comp. §6, ch. 25046, 1949.

Loyalty Oaths

LOYALTY OATH

As required by Chapter 25046 (No. 50) Acts of 1949

I, ... a citizen of the State of Florida and of the United States of America, and being employed by or an officer of ..... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Community Party; that I do not believe in the overthrow of the government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the government of the United States or of Florida by force or violence.

.....

STATE OF FLORIDA,
COUNTY OF .....

Personally appeared before me ..... who states ..... has read the foregoing oath and is familiar with what it says and that ..... signed it freely and voluntarily, and in my presence.

SWORN TO before me this .....
day of ..... A.D. 19.....

.....

LOYALTY OATH

As required by Chapter 25046 (No. 50) Acts of 1949

"I, ... a citizen of the State of Florida and of the United States of America, and being employed by or an officer of ..... and a recipient of public funds as such employee or officer do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence."

.....

STATE OF FLORIDA,
COUNTY OF ....., *ss.*:

Personally appeared before me ..... who states ..... has read the foregoing oath and is familiar with what it says and that ..... signed it freely and voluntarily, and in my presence.

SWORN TO and subscribed to and before me this ..... day of ....., A.D. 196 .....

.....
Notary Public

MY COMMISSION EXPIRES:

.....

(NOTARY SEAL)

Memorandum Opinion

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

No. 69-240-Orl-Civ

DR. PAUL L. ADAMS, JOHN HARDIN BEST, ROBERT L. CURRAN, RICHARD P. AHYNES, MARGARET ANNE HUGHES, ROBERT W. KEISER, LEROY L. LAMBORN, JAMES D. MILLIKAN, NORMA P. MUNN, O. RUTH MCQUOWN and ROBERT R. SHERMAN, individually, and on behalf of all other persons similarly situated,

Plaintiffs,

—v.—

THE BOARD OF REGENTS OF THE STATE OF FLORIDA, a Florida corporation, D. BURKE KIBLER, DR. LOUIS C. MURRAY, JOHN C. BEHRINGER, PAT DODSON, CHESTER FERGUSON, HENRY D. KRAMER, CLARENCE L. MENSER, JULIUS F. PARKER and MRS. E. C. (CAROLYN) PEARCE, members of the Board of Regents, STEPHEN C. O'CONNELL, President of the University of Florida,

Defendants.

MEMORANDUM

(1970)

Before:

SIMPSON, *Circuit Judge,*
YOUNG and SCOTT, *District Judges.*

PER CURIAM.

The plaintiffs in this case are and were faculty and staff members of the University of Florida and other state institutions under control of the defendant Board of Regents.

On October 16, 1969, while *Connell* v. *Higginbotham,* 38 LW 2266, —— F. Supp. ——, No. 69-34-Orlando-Civil, Middle District of Florida 1969, was being considered by the Court, President Stephen C. O'Connell of the University of Florida issued a memorandum to all faculty and staff of the University informing them that they would be required to execute the loyalty oath prescribed by Section 876.05 of the Florida Statutes. Plaintiffs, in their complaint, stated that on information and belief similar directives would be forthcoming from other administrators operating under the control of the Board of Regents.

Plaintiffs have (a) never executed a loyalty oath or (b) executed a loyalty oath which was not acknowledged or (c) executed a loyalty oath under protest.

Plaintiffs then brought this action alleging the requirement to execute the oath violated their constitutional rights and requesting a temporary restraining order preventing defendants from dismissing them before an adjudication on the merits. The motion for the temporary restraining order, to prevent their dismissal by defendants, was heard by a single judge of this Court (Judge Young) on the

date, October 30, 1969, that the opinion and judgment in *Connell, supra,* was announced. After announcing the decision in *Connell,* Judge Young denied the motion for a temporary restraining order. He pointed out that under the ruling announced by *Connell,* defendants could lawfully require the plaintiffs to take a portion of the oath as a condition of employment with the state. See *Connell, supra.* He further pointed out that should plaintiffs decline to execute the constitutional portion of the oath, and should they be dismissed by defendants, any injury to them could be compensated by damages if they were successful on the merits before the three-judge panel or on appeal.

On November 14, 1969, plaintiffs' motion for emergency consideration of an appeal was denied by a panel of the Court of Appeals for the Fifth Circuit for want of jurisdiction.

Subsequently, plaintiffs Anne C. Bardsley, LeRoy L. Lamborn and Evan Suits refused to execute the oath as modified by *Connell* and were discharged by defendants.

The parties having stipulated that this cause shall be determined solely upon the pleadings herein, together with a stipulation of facts, and having adopted the briefs filed in the case of *Connell* v. *Higginbotham, et al., supra,* after due consideration by this three-judge district court, we hereby hold the following:

1. This Court has jurisdiction pursuant to 28 U.S.C. §§1331, 1343, 2201, 2202, 2281 and 2284, as well as the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

2. Plaintiffs have standing to bring this action.

3. Leave to prosecute this suit as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure is granted.

4. Defendants may condition employment and the payment of salary on the execution of the following portion of the loyalty oath prescribed by Section 876.05 of the Florida Statutes:

> "I, ..., a citizen of the State of Florida and of the United States of America and being employed by or an officer of ..... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence".

All other portions of the loyalty oath prescribed by Section 876.05 of the Florida Statutes, as well as the corresponding provisions of Section 876.07 of the Florida Statutes, are unconstitutional and defendants may not condition employment or the payment of salary on the execution of those provisions. *See Connell* v. *Higginbotham, supra.*

5. Judge Simpson adheres to the views expressed in *Connell, supra,* 38 LW 2266, —— F. Supp. ——. For the reasons there indicated, he would further strike from the loyalty oath prescribed by Section 876.05 of the Florida Statutes, as unconstitutional, the following language:

> ". . . that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence".

Judge Young adheres to the views expressed in his special concurrence in *Connell, supra,* 38 LW 2266, —— F. Supp. ——.

6. Since we hold that defendants may condition employment and payment of salary on the taking of the loyalty oath described in (4) above, we further hold that the *dismissal* of plaintiffs LeRoy L. Lamborn, Anne C. Bardsley and Evan Suits for refusal to execute this approved oath was lawful.

7. We affirm the denial of the motion for temporary restraining order, by Judge Young of this panel, refusing to enjoin the dismissal of plaintiffs for refusal to execute the approved portion of the loyalty oath.

/s/ BRYAN SIMPSON
United States Circuit Judge

/s/ GEORGE C. YOUNG
United States District Judge

/s/ CHARLES R. SCOTT
United States District Judge

Judgment

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

No. 69-240-Orl-Civ

DR. PAUL L. ADAMS, JOHN HARDIN BEST, ROBERT L. CURRAN, RICHARD P. AHYNES, MARGARET ANNE HUGHES, ROBERT W. KEISER, LEROY L. LAMBORN, JAMES D. MILLIKAN, NORMA P. MUNN, O. RUTH MCQUOWN and ROBERT R. SHERMAN, individually, and on behalf of all other persons similarly situated,

Plaintiffs,

v.

THE BOARD OF REGENTS OF THE STATE OF FLORIDA, a Florida corporation, D. BURKE KIBLER, DR. LOUIS C. MURRAY, JOHN C. BEHRINGER, PAT DODSON, CHESTER FERGUSON, HENRY D. KRAMER, CLARENCE L. MENSER, JULIUS F. PARKER and MRS. E. C. (CAROLYN) PEARCE, members of the Board of Regents, STEPHEN C. O'CONNELL, President of the University of Florida,

Defendants.

It is

ORDERED AND ADJUDGED:

1. Final judgment shall be and is hereby entered in favor of plaintiffs Dr. Paul Adams, et al. and on behalf of

all persons similarly situated, and against defendants The Board of Regents of the State of Florida, et al. in accordance with the per curiam opinion of the Court.

2. Defendants, their agents, officers or employees, are permanently enjoined from conditioning employment on the taking of an oath which prescribes "that I am not a member of the Communist Party" or "that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party" or "that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the United States by force or violence", which provisions are now contained in Section 876.05 of the Florida Statutes. Defendants, their agents, officers and employees, are likewise permanently enjoined from enforcing Section 876.07 of the Florida Statutes in such a manner as to require the execution of the above disapproved phrases as a condition to remaining in defendants' employ or as a condition to receiving payment from defendants for services rendered.

3. The Court retains jurisdiction of this suit for the purpose of insuring compliance with this injunction.

4. Costs shall be hereafter taxed in favor of plaintiffs and against defendants.

DONE AND ORDERED this 27th day of January, 1970.

/s/ BRYAN SIMPSON
United States Circuit Judge

/s/ GEORGE C. YOUNG
United States District Judge

/s/ CHARLES R. SCOTT
United States District Judge

Temporary Restraining Order

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

No. 69-240-Orl-Civ.

DR. PAUL ADAMS, *et al.*,

Plaintiffs,

—vs.—

THE BOARD OF REGENTS OF THE STATE OF FLORIDA, *et al.*,

Defendants.

On October 24, 1969, plaintiffs in the above styled cause filed their complaint against defendants seeking a hearing and determination of the federal constitutional issues allegedly involved in §876.05 of the Florida Statutes. Plaintiffs are nine members of the faculty and two staff members presently employed by the University of Florida, and defendants are the Board of Regents of the State of Florida, a body corporate, the members of the Board of Regents, and Stephen C. O'Connell, President of the University of Florida.

Plaintiffs filed a motion for temporary restraining order to restrain defendants from requiring plaintiffs to sign the Florida loyalty oath as provided by §876.05 of the Florida Statutes, and as amended by the decision of the Supreme Court of the State of Florida in *Cramp* v. *Board of Public*

Instruction, 137 So. 2d 528 (1962). Attached to the complaint were copies of a memorandum from President Stephen C. O'Connell to all Deans, Directors, and Department Chairmen requiring that a constitutional oath be signed by each faculty and staff member prior to November 15, 1969, together with a copy of the form of oath which was to be executed by all personnel of the University of Florida.

The motion was heard upon notice to all parties on October 30, 1969, counsel for plaintiffs, the Board of Regents, and President Stephen C. O'Connell all being present before the Court. Counsel stipulated that plaintiffs were all faculty and staff members presently employed by the University of Florida, as alleged in the complaint; that President Stephen C. O'Connell had sent out the memorandum attached to the complaint, and that the loyalty oath in the form attached to the complaint was required to be executed or re-executed by all personnel at the University of Florida. The parties, through their respective counsel, further stipulated that plaintiffs had refused to execute the oath in the form presented to them by the authorities of the University of Florida.

Immediately prior to the hearing on the motion for temporary restraining order, a decision and final judgment was filed in the case of *Connell* v. *Higginbotham,* No. 69-34-Orlando-Civil, United States District Court, Middle District of Florida, Orlando Division, in which a three judge court held that only the following language of §876.05 of the Florida Statutes is constitutional, and the state may condition employment on the execution of an oath containing language, to-wit:

> "I, ..., a citizen of the State of Florida and of the United States of America and being

employed by or an officer of ..... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the constitution of the United States and of the State of Florida; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence".

The aforesaid *Connell* case held the following clauses contained in the oath submitted to the plaintiffs to be unconstitutional: "that I am not a member of the Communist party" and "that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence."

The decision by the three judge court in *Connell* is binding on this single judge and controls the decision that must be made on the application for a temporary restraining order. In *Connell* the undersigned judge noted his reluctance to concurring with the holding of unconstitutionality of the two above quoted clauses but that controlling decisions compelled such a determination. Again, as in *Connell*, this Court must abide by the law as it understands it to be; trial courts have no authority to make the law—only authority to apply it.

The plaintiffs have neither shown irreparable damage to them in the event the entire oath were eventually held to be unconstitutional nor shown a likelihood that the portions of the oath approved in the Connell case may eventually be held unconstitutional by the Supreme Court of the United States. As the undersigned judge noted from the bench at the conclusion of the hearing on the application for a temporary restraining order, there is more involved

in this and similar cases than just the rights of the plaintiffs alone. In speaking of constitutional rights, the rights of all citizens are equally involved. The constitution is not only an instrument guarantying rights to individuals, but it is a blueprint for Government; it is the basic document upon which our Government is based. So, in considering the rights of individuals, they cannot be viewed in an isolated vacuum, but must be considered in light of mutual rights. While the Government may not inflict punishment or a penalty for the failure of a person to avow support of the Constitution or of the Government, I think that it is a legitimate end of the Government to ascertain whether or not an employee who is going to work for the Government believes in the principles of the Government for which it works—the basic principles that are so important to this nation: the right of free speech; the right to worship as one pleases; the right of a free press; the right to a jury trial and have counsel among others are the precepts upon which our Government is based.

It seems to me that it is a legitimate end for the employer-Government in hiring employees to know if the employees believe in the overthrow of the Government by violent means. In fact, I think that the Government would be derelict if it didn't know that, and if it didn't know it, it might be that it would not be long before the Constitution which is the shield under which this action is brought, might cease to exist.

So, a temporary restraining order granting the relief prayed for, predicated upon the plaintiffs refusing to sign any oath should not be granted. However, in view of the decision in *Connell,* the plaintiffs are entitled to have an oath submitted to them which complies with that decision; it is, therefore,

ORDERED that the temporary restraining order prayed for by the plaintiffs be and is hereby denied except that the oath submitted to the plaintiffs or any members of the class they represent shall not contain the language disapproved as unconstitutional in *Connell* v. *Higginbotham, supra.* Therefore, it is further,

ORDERED that the defendants, their agents, officers or employees are temporarily restrained from conditioning employment on the taking of an oath which prescribes "that I am not a member of the Communist Party" or "that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the United States by force or violence", which provisions are now contained in Section 876.05 of the Florida Statutes. The defendants, their agents, officers and employees are likewise temporarily restrained from enforcing Section 876.07 of the Florida Statutes in such a manner as to require the execution of the above disapproved phrases as a condition to remaining in the defendants' employ or as a condition to receiving payment from the defendants for services rendered. This order shall remain in force until final hearing and determination thereon by the full court.

DONE and ORDERED in Chambers at Orlando, Florida, this 7th day of November, 1969.

GEORGE C. YOUNG
United States District Judge

Copies mailed to:

Jerome J. Bornstein, Esquire
125 South Court Avenue
Orlando, Florida

Rivers Buford, Jr., Esquire
1124 Alachua Street
Tallahassee, Florida

Thomas S. Biggs, Jr., Esquire
623 Barnett Bank Building
Jacksonville, Florida

Administrative Memorandum

UNIVERSITY OF FLORIDA

Gainesville

Office of the President October 16, 1969

MEMORANDUM

To: Deans, Directors and Department Chairmen

Re: Loyalty Oath

Section 876.05, Florida Statutes, 1969, requires that a loyalty oath shall be filed by all persons employed by the State, and that such an oath must be filed prior to the approval of any voucher for the payment of salary, expenses, or other compensation. At its meeting on February 3, 1969, the Board of Regents amended the oath required of employees of the University System to concur in the wording prescribed by the Supreme Court of Florida.

A review of the personnel files reveals that many of the loyalty oath forms contain wording which has been determined to be unconstitutional. Others have not been properly notarized.

To insure that each personnel file contains a loyalty oath that is properly worded and notarized as required by the Florida Statutes it is necessary that each member of the faculty and staff complete a current oath.

Enclosed are forms for each faculty and staff member paid from the budgetary accounts you administer, together with a check list for each account. Please ask each person listed

to complete a new loyalty oath and have his signature notarized. The completed cards should be returned, together with the check lists, to the Personnel Division, Room 217, Hub, by November 15, 1969.

Notaries in the various colleges, divisions and departments should be used whenever possible. The Personnel Division employs three notaries whose services are available upon request. Should you desire their assistance, please make arrangements by calling Luther Bunn, 2-1209.

Stephen C. O'Connell
President

October 17, 1969

MEMORANDUM

To: All Staff

FROM: Stephen J. Pritz
Assistant in Administration

SUBJECT: Completion of Current Loyalty Oath

Section 876.05, Florida Statutes, 1969, requires that a Loyalty Oath be filed by all persons employed by the State and that the Oath must be filed prior to the approval of any voucher for the payment of salary, expenses, or other compensation.

It appears that many of the Loyalty Oath forms now on file in Personnel records contain wording which has been determined to be unconstitutional. Some forms have not been properly notarized. To insure consistency, the Personnel Division has asked us to have each staff member listed on our current budget complete a new Loyalty Oath with the signature properly notarized. Mr. Sagonias, our Chief Pharmacist, is a Notary Public; and arrangements can be made to fulfill the requirements of proper notarization.

It is imperative that the forms be completed at your earliest possible convenience. Please be advised that the Florida Board of Regents Operating Manual states that any employee refusing to comply with the provisions of this section of the Florida Statutes shall be dismissed. If you have questions regarding any part of this, please come to my office; and we will try to find a satisfactory answer to your problem.

SJP:ddr

UNIVERSITY OF FLORIDA

Gainesville

Office of the President — November 7, 1969

Will those faculty members who did not sign the original oath, please see edie 164C

MEMORANDUM

To: Deans, Directors and Department Chairmen

Re: Loyalty Oath

On October 16 you received a memorandum from my office concerning the State of Florida loyalty oath. On October 30 the Circuit Court in Orlando ruled certain portions of this oath to be unconstitutional and enjoined the Board of Regents and the University of Florida from requiring a signature to the oath distributed with that memorandum.

Attached hereto you will find a memorandum from the Office of the Board of Regents setting out the revised oath and outlining the procedure to be followed. You will note that it will not be necessary to require an employee to execute this revised form of oath if an oath was executed in conformity with the memorandum of October 16 prior to October 30, 1969. You will also note that anyone who wishes to execute a new oath and withdraw the previously executed oath should be permitted to do so.

Enclosed are new forms with the revised oath printed thereon. To insure proper certification of the payroll for November, please deliver a properly executed and nota-

rized loyalty oath for each employee, together with the check lists to the Personnel Division by November 20, 1969. This is necessary to insure that all employees are paid on schedule.

You are again cautioned that, in order to be valid, this oath must be signed in the presence of a notary. You will find attached a list of notaries and their locations.

I realize that a short length of time is provided for obtaining properly executed oaths. I therefore ask that all persons give their full cooperation in achieving this end.

STEPHEN C. O'CONNELL
Stephen C. O'Connell
President

Stipulation

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

Civil Action No. 69-240

DR. PAUL ADAMS, *et al.*,

Plaintiffs,

—VS—

THE BOARD OF REGENTS OF THE STATE OF FLORIDA, *et al.*,

Defendants.

IT IS HEREBY stipulated and agreed by and between counsel for the respective parties as follows:

1. That ANNE C. BARDSLEY and EVAN SUITS come within the class affected by the outcome of this litigation, and shall be joined as parties Plaintiff in this cause.

2. That LEROY L. LAMBORN, ANNE C. BARDSLEY and EVAN SUITS have refused to sign the loyalty oath prescribed by Section 876.05 of the Florida Statutes, as modified by the decision of this Court in *Connell* vs. *Board of Public Instruction*, a copy of the oath furnished to these Plaintiffs being annexed hereto and incorporated herein by reference as Exhibit "1".

3. That as a direct result of the refusal of these Plaintiffs to execute under oath the loyalty oath attached hereto to Exhibit "1", LAMBORN, BARDSLEY and SUITS were discharged from their employment by the University of Florida on November 26, 1969.

4. That LEROY L. LAMBORN had been employed by the University of Florida as Assistant Professor of Law for the Academic year 1969-1970 at a salary of $12,000.00, a copy of his appointment of employment being attached hereto and incorporated herein by reference as Exhibit "2".

5. That EVAN SUITS had been employed by the University of Florida as Interim Instructor in the Department of Psychology at a monthly salary of $375.00 for the academic year, 1969-1970.

6. That ANNE C. BARDSLEY had been employed by the University of Florida as a Clerk II in the Library system, at a monthly salary of $314.00 for the period of July 1, 1969 to June 30, 1970.

7. That the academic year, 1969-1970, at the University of Florida commenced September 16, 1969, and concludes June 15, 1970.

DATED this 17th day of December, 1969.

/s/ RIVERS BUFORD, JR.
Rivers Buford, Jr.
General Counsel
State Board of Education
The Capitol, Suite 105
Tallahassee, Florida 32304
Attorney for the Board of Regents and Each of the Regents Individually

/s/ JEROME J. BORNSTEIN
Jerome J. Bornstein, of
BORNSTEIN, PETREE & GLUCKMAN
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Attorneys for Plaintiffs

/s/ THOMAS S. BIGGS, JR.
Thomas S. Biggs, Jr., Esquire
Tigert Hall
University of Florida
Gainesville, Florida 32601
Attorney for Stephen C. O'Connell President of the University of Florida

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
SEP 12 1970
ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. [redacted] 79

STELLA CONNELL, individually, and on behalf of all persons similarly situated,

Appellant,

v.

JAMES M. HIGGINBOTHAM, Superintendent of the Orange County Board of Public Instruction, LOUISE BREEZE, Chairman of the Orange County Board of Public Instruction, and LOWELL CLEMENTS, RAYMOND H. BASSETT, WILLIAM D. LaRUE, HARLEY THOMPKINS, MRS. LEE K. DAVIES and STEWART M. SCHAFFER,

Appellees (Defendants).

FLOYD T. CHRISTIAN, Commissioner of Education, State of Florida,

Appellee (Intervenor)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF APPELLEES

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ATTORNEYS FOR APPELLEES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1113

STELLA CONNELL, individually, and on behalf of all persons similarly situated,

Appellant,

v.

JAMES M. HIGGINBOTHAM, Superintendent of the Orange County Board of Public Instruction, LOUISE BREEZE, Chairman of the Orange County Board of Public Instruction, and LOWELL CLEMENTS, RAYMOND H. BASSETT, WILLIAM D. LaRUE, HARLEY THOMPKINS, MRS. LEE K. DAVIES and STEWART M. SCHAFFER,

Appellees (Defendants).

FLOYD T. CHRISTIAN, Commissioner of Education, State of Florida,

Appellee (Intervenor)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

STATEMENT OF THE CASE

Floyd T. Christian, appellee-intervenor, accepts the appellant's statement of the case as presented at pages 4-10 of Brief of Appellant.

Appellees would observe, however, that appellant was apparently aware of the subject oath upon her assumption of duties, *Appellant's Jt. App.*, pp. 34 [140], 143 [order of court], but sought out this cause as a test case.

ARGUMENT

James M. Higginbotham, et al., appellees, and Floyd T. Christian, intervenor-appellee, respectfully commend to this Court a foundational argument, and would then proceed to examine the more salient of appellant's arguments.

I.

ACTION OF DISTRICT COURT

By Judgment and Order of October 30, 1969, (*Appellant's Jt. Appendix*, pp. 141-158) the Three-Judge United States District Court for the Middle District of Florida did the following:

1. First, the lower Court held the plaintiff-appellant, to be representative of the class of all state employees, to which class the requirement of oath-taking (Section 876.05, Florida Statutes) is indiscriminately applicable. (Opinion pp. 6-7.) (*Appellant's Jt. App.*, pp. 145-6)

2. Secondly, and foundational to judicial mutation of the statutory oath, the court held the provisions of the act to be severable. (Opinion p. 8.) The Court cited *United States v. Jackson*, 390 U.S. 570, 585 (1967), and noted the Florida Supreme Court's agreement with the severability doctrine as it related to this very statute. *Cramp v. Board of Public Instruction*, (Fla. 1962) 137 So.2d 528. To which law, and admitting a spate of supporting decisional law, appellant responds with *ipse dixit* that "since it is now clear [to appellant] that not just one, but between three and five of the five operative provisions . . . are unconstitutional," this Court "must" consider the law on the subject *de novo* and the raft of reported cases must be viewed as *tabula rasa*. (*Appellant's Jurisdictional Statement*, p. 25)

Risking ignoration of whatever Pythagorean nexus might, as alleged, obtain as between (a) "three and five of the five operative provisions" and (b) the disvalue of the controlling cases, these appellees urge the said cases as controlling still. (Certainly it would be the most circular of circular arguments to hold the statutory provisions unseverable because "the statute" is unconstitutional, if the unconstitutionality of the statute *in toto* is dependent upon a determination of severability. And to hold the statutory provisions unseverable, despite the case law, because "three" or more provisions strike appellant as unconstitutional would be a coercive *non sequitur*.)[1]

In fine, the statutory oath as upheld below is constituted of two independent, compound clauses—each of which is an intelligible compound proposition logically autonomous, however ideologically consonant. (See *Appellant's Jt. App.*, p. 153)

3. Citing to a raft of decisions invalidating oath provisions exacting declarations of non-membership in certain organizations, the lower Court struck down such exactions as appeared in the subject oath. (Opinion pp. 8-12.) (*Appellant's Jt. App.*, pp. 148-51)

4. The Court below, in recognition of the psychological datum that belief is a spring to behavior or at least that the two are functionally inextricable, held constitutional the provision, " . . . that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence . . . " (Opinion pp. 12-13.) (*Appellant's Jt. App.*, pp. 151-52)

[1] See, *American Communications Assn. v. Douds*, 339 U. S. 382 at 393 re. J. Holmes' and J. Reed's derogation of mathematical formulae as criteria of constitutional meaning.

The lower Court was not unaware that "As in *Cramp v. Board of Public Instruction* . . . [the Supreme Court does] not question the power of a state to take proper measures safeguarding the public service from disloyal conduct." *Baggett v. Bullitt*, 377 U. S. 360, 380, (1964) (Opinion of Clark, J.). For clearly the Bill of Rights has not been converted into a "suicide pact." *Terminello v. Chicago*, 337 U. S. 1, 37 (1949). And with "education . . . perhaps the most important function of state and local governments," *Brown v. Board of Public Education of Topeka*, 347 U. S. 483, 493, a function which is the "principal instrument in awakening the child to cultural values . . ." *Ibid*, the lower Court sustained a mild measure somewhat protective of the community's interest in its posterity. (Opinion pp. 12-13.)[2] (*Appellant's Jt. App.*, pp. 151-52)

"Indeed, it is plain that a state has a clear interest in assuming '. . . careful and discriminating selection of teachers' by its publicly supported educational institutions. See *Shelton v. Tucker*, 364 U. S. 479, at 495-496 . . . (dissenting opinion of Frankfurter, J.); see also majority opinion at 485 . . ." *Knight v. Board of Regents of University of State of New York*, (S.D.N.Y. 1967) 269 F.Supp. 339, at 342, aff'd. 390 U. S. 36 (1968).

5. Finally, the lower Court found nothing destructive of, nor antithetic to, First or Fourteenth Amendment freedoms by requiring of government employees the taking of an oath in support of the constitutions of the United States and Florida. Indeed this Court has, albeit in dicta, expressly

[2]See, Weaver, *The Ethics of Rhetoric*, "Dialectic and Rhetoric at Dayton, Tenn." at pp. 36-38, for arguments of Clarence Darrow (in the Leopold & Loeb case) and William Jennings Bryan (in the Scopes trial) testifying to the formidable effects of even subtle educational experiences.

sanctioned state exaction of an oath of support of the Constitution. *Bond v. Floyd*, 385 U. S. 116, 135 (1966).

One of the most succinct and applicable judicial statements on this limited subject issued in *Gilmore v. James*, 274 F. Supp. 75, 92 (1967):

> "Oaths in support of the government are not abhorent to the Constitution. Indeed the Constitution provides one [citing U. S. Const. Art. II, §7]."

To appellant's assertion that the oath's import is unfathomable or dangerously vague, the concerning opinion of Mr. Justice Harlan (joined by Chief Justice Burger) in *Cole v. Richardson* and *Richardson v. Cole* (March 16, 1970) 38 Law Week 3362, 3363, is, we submit, responsive:

> ". . . almost any word or phrase may be rendered vague and ambiguous by dissection with a semantic scalpel."
>
> * * *
>
> "I think it can be fairly said that subscribing to the instant oath subjected appellant to no more than an amenity. No First Amendment considerations are, in my view, at all involved in this case. This oath does not impinge on conscience or belief, except to the extent that oathtaking as such may offend particular individuals . . ."

The District Court in *Hosack v. Smiley*, (D. C. Colo. 1967) 276 F.Supp. 876, aff'd 390 U. S. 744 (1968), treated of alleged vagueness or inhibition of precious historical freedoms by tersely observing that an oath to support the constitutional process does not stagger the understanding of "men of common intelligence," (citing *Cramp v. Board of Public Instruction*, 368 U. S. 278, 287) for it is "plain, straightforward and unequivocal." *at* 878.

Note should be made of two recent decisions rendered in approbation of such oaths: *Knight v. Board of Regents of University of the State of New York* (S.D.N.Y. 1967) 269 F. Supp. 399, aff'd 390 U. S. 36 (1968); *Stewart v. Washington* (D.D.C. 1969) 301 F. Supp. 610, 611-612. Indeed, the oath sanctioned in the *Knight* case, *supra*, required one to pledge to "preserve, protect and defend"—beyond merely supporting—the Constitution. *Knight, supra.*

6. The lower Court, thereupon, upheld such provisions of Section 876.07, Florida Statutes, as are apposite of the valid provisions of the oath prescribed in and by Section 876.05, Florida Statutes. (Opinion pp. 14-15.)

II.

THE LOYALTY OATH *PER SE*

The Supreme Court of the United States has not declared loyalty oaths, so-called, to be generically unconstitutional.

Indeed, Article II, §7 of the Constitution of the United States prescribes the following presidential oath:

> "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

Moreover, Article VI, §3 of the Constitution of the United States requires that the "senators and representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution . . . "

Accordingly, the Congress of the United States, on June 1, 1789, enacted Statute 1, Chapter 1, §1:

> "* * * That the oath or affirmation required by the sixth article of the Constitution of the United States, shall be administered in the form following, to wit: 'I A.B. do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States."

In purely formal terms, then, the loyalty oath—to support, to protect, to preserve, to defend the Constitution—is resident in the Constitution and found expression in the first Congress' first act. Apt, therefore, are the words of Chief Justice Marshall in *M'Culloch v. The State of Maryland*, 4 L.Ed. 579 at 600, uttered in another context:

> "It has been truly said that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation."

Even if we are unable to say with St. Augustine, *Nisi credideritis non intelligetis*,* we are at the very least compelled to agree with Chief Justice Marshall's charitable view that "it is conceived that a doubtful question . . . if not put at rest by the practice of government, ought to receive a considerable impression from that practice." *Ibid.*

In fine, though appellant anathematizes all manner of loyalty oath—escalating denigration from a description of such oaths as "not a significant matter" to "no substantive importance" (*Appellant's Brief*, p. 37) to a condemnation of "irrelevant restraint" [upon freedom] (*Id.* at 38)—the oath as

*"If you do not believe, you will not understand."

such is part and parcel of our Constitution and springs from the seed time of the republic.

Upon one ground or another, and in disparite contexts, this Court has upheld the requirement of a loyalty oath or affidavit, or even a disclaimer of disloyal activity. *Viz., American Communications Asso., CIO v. Douds*, 339 U. S. 382†; *Osman v. Douds*, 339 U. S. 846; *Gerende v. Board of Supervisors of Elections of Baltimore City*, 341 U. S. 56; *Garner v. Board of Public Works*, 341 U. S. 716; *Knight v. Board of Regents*, 390 U. S. 36, affirming 269 F.Supp. 339. See, also, *Bond v. Floyd*, 385 U. S. 116, 135.

Other and recent decisions not surprisingly upholding the generic constitutionality of loyalty oaths are as follows.

In *Knight v. Board of Regents of the University of the State of New York* (SD NY 1967) 269 F.Supp. 339, aff'd 390 U. S. 36, 19 L.Ed. 2d 812, the court upheld the constitutionality of a statutory oath which read:

> "I do solemnly swear (or affirm) that I will support the constitution of the United States of America and the constitution of the State of New York . . ."

The *Knight* court concluded, at 341:

> "• • • we interpret the statute to impose no restrictions upon political or philosophical expressions by teachers. . . . A state does not interfere with its teachers by requiring them to support the governmental systems which shelter and nourish the institutions in which they teach . . . Indeed, it is plain that a state has a clear interest in assuring ' . . . careful and discriminating selection of teachers' by its publically supported educational institutions. Shelton v. Tucker, 364 U. S. 479 . . ."

†But see, *U.S. v. Brown*, 381 U.S. 437

In *Hosack v. Smiley* (D. Colo. 1967) 276 F.Supp. 876, the court upheld the constitutionality of an oath which read:

> "I solemnly swear or affirm that I will support the Constitution of the State of Colorado and of the United States of America and the laws of Colorado and of the United States of America."

The subject oath was found to be "plain, straightforward and unequivocal," at 878, and therefore the court held "that an oath to support the constitution and laws of the state and nation does not and can not run counter to First Amendment freedoms." at 880.

Also, *Stewart v. Washington* (D.C. 1969) 301 F.Supp. 610 and *Gilmore v. James* (ND Tex. 1967) 274 F.Supp. 75.

The residency of the loyalty oath in the Constitution of the United States and in the first Congress' first enactment is not without compelling conceptual and historical rationale.

An appropriate point of departure is Mr. Justice Frankfurter's insightful observation in *Minersville School Dist. v. Gobitis*, 310 U. S. 586 (1940) [overruled by *W. Vir. State Board of Education v. Barnette*, 319 U. S. 624 (1943)]:

> "The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment if fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization. 'We live by symbols.'" *at 596.*

There is of this nothing abstruse. "In its simplest definition, a symbol is a conventional sign. A sign represents or signifies: it conveys a meaning. . . . All words are symbols . . . their

power is indirect, through their effect on men." Ross, SYMBOLS & CIVILIZATION (1957) 164.

Mr. Justice Frankfurter's observation—with its contemporary referent in the case at bar—is of the first importance. As Professor Ross insists:

> "The bonds of society are the shared symbols, rituals, values, and beliefs of its members, and it is in these that the 'meaning' of the society is contained. . . . Personal freedom yields little of value outside a social order and tradition; it can in fact be guaranteed only in a political and social order, and the value of individual differences, of choice and free intelligence, and the arts and sciences which they nurture, are dependent on shared ritual, symbol and emotion. Our social roots are often forgotten because they are firmly embedded and raise no practical problem. If we forget them overlong, we may uproot them, and with them, ourselves." SYMBOLS & CIVILIZATION, at 172.

In fine, the emotive *sine qua non* of social life is symbolized by such oaths as the one at bar, and appellant did not present to the lower Court evidence of a societal disaffection indicative of such symbols' desuetude. Hence, even as there is no rationale according to which this Court should encourage such a disaffection by denigrating this oath, there is compelling reason for this Court to sanction an existing oath's operation.

Symbols of allegiance are both indicative of social cohesion and, absent massive disaffection, are in turn promotive of its continuation. Chief Justice Waite stated the matter in *Minor v. Happersett*, 88 U. S. 165-166 (1875):

> "The very idea of a political community, such as a nation is, implies an association of persons for the

> promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. . . ."

Though representative of Nineteenth Century formulation, Chief Justice Waite's assertion is not to be doubted as a socio-political proposition of importance. And it is from this matrix that such compelling symbols as the instant oath spring.

Historically viewed, as noted by the Court in *Knight v. Board of Regents of University of State of New York* (SD NY 1967) 269 F. Supp 339, 341, "The statutory language of support of the constitutional governments can be substantially equated to that allegiance which, by the common law, every citizen was understood to owe his sovereign."

The court, at 341, cited to 1 *Blackstone's Commentaries* (Fifth Edition) 369:

> "Which occasions Sir Edward Coke very justly to observe, that all subjects are equally bounden to their allegiance, as if they had taken the oath; because it is written by the finger of the law in their hearts, and the taking of the corporal oath is but an outward declaration of the same."

Chief Justice Vanderbilt, of the New Jersey Supreme Court, in *Imbrie v. Marsh* (N.J.) 3 N.J. 578, 71 A.2d 352, 243, 18 ALR 2d 241, wrote:

> "The oath has played a significant part in government from the earliest times; thus we find Lycurgus saying to the Athenians: 'An oath is the bond that keeps the state together,' Oratio in Leocratem 80 and Montesquieu

> attributing the strength of the Romans to their respect for an oath: 'Such was the influence of an oath among these people that nothing bound them stronger to the laws. They often did more for the observance of an oath than they would have done for the thirst of glory or the love of their country,' The Spirit of the Laws, Book VIII, Chap. 13 . . . . "

Chief Justice Vanderbilt, citing to *Omychund v. Barker*, 1 Atk 21, 34 (ch 1744), at 243, declared:

> "No country can subsist a twelve-month where an oath is not thought binding; for want of it must necessarily dissolve society."

Thus, appellees hold the nescient dismissal of such oaths (as of "no substantive importance" or as "not a significant matter") to be quite short of the mark philosophically, sociologically and in point of history.

Because, as noted hereinbefore, "appellant did not present to the lower Court evidence of a societal disaffection indicative of such symbols' [as oaths'] desuetude . . . There is no rationale according to which this Court should encourage such disaffection" by invalidating the loyalty oath as such.

The foregoing notwithstanding, appellant urges the invalidation of the oath provision *"I will support the Constitution of the United States and of the State of Florida,"* on the mind-bending ground that it "is really a negative test oath masquerading as an affirmative oath of office." (*Appellant's Brief*, p.24) Doubting the conceptual legerdemain by which this might have been accomplished, appellees believe the circumstantial evidence and authorities hereinbefore cited to validate the subject provision. For as Henry David Thoreau put it: "Some circumstantial evidence is very good, as when you find a trout in your morning milk" . . . or a Consti-

tutional oath challenged as unconstitutional *per se!*

III.

"NEGATIVE" OATH PROVISION

Objecting to the so-called "negative loyalty oath" provision of §876.05, Florida Statutes, *"I do not believe in the violent overthrow of the Government of the United States or of the State of Florida by force or violence,"* appellant indulges her ideological absolutism by declaring (at p. 29, *Appellant's Brief*):

> "All such disclaimers or negative loyalty oaths, cast in political terms offend the First and Fourteenth Amendments' freedoms of expression, belief and privacy. Even the clearest and most precise disclaimer imaginable would be unconstitutional, particularly when demanded indiscriminately of all government employees or beneficiaries."

Appellees would caution that in jurisprudence, as "in philosophy . . . [and] daily life, cocksureness is a function of ignorance and dunces step in where sages fear to tread." *Joad, PHILOSOPHY* (Fawcett 1966) 10.

Lest we be swept over an emotional falls by a niagara of well-intentioned libertarian ideology, it is well to keep our feet on high and dry constitutional terrain.

The honorific *freedom of belief* which appellant finds offended by the abovestated provision is, after all, a judicial construct and, however salutary that artisanship, ought not be allowed *exclusive* occupancy of a given dialectical circumstance. The Court should employ the construct prudently under the circumstances of a given case. See, *United States v. Robel*, 389 U.S. 258, 282-3 (White, dissent)

First, the instant cause concerns, and was raised by, a school teacher. As the lower Court observed:

> What a person believes has a central effect on the views and actions taken by that person. . . . This principle has exceptional significance when applied to school teachers. Teachers, particularly those of the lower grades, are dealing with young and very impressionable minds. Who can doubt that the teacher is one of the most important persons in the life of any youngster or that the views expressed by the teacher have great impact on the developing attitudes of the child. . . . [T]he potential for the exertion of the principles of violent overthrow . . . on the younger, inferior mind does exist. This potential presents grave dangers to the state's legitimate interest in educating youth and in the principles of ordered government and the orderly process for change. The state may take reasonable steps to prevent frustration of that end. Cf. *American Communications Association v. Douds*, 339 U. S. 382 (1950)". *Judgment & Order*, Oct. 30, 1969 at *Appellant's Jt. App.*, p.152.

One need not hold to the supposedly scientific and widely-accepted views of Prof. John B. Watson, expressed in his famed *BEHAVIORISM* (1924) that no belief is private inasmuch as all belief is subvocal action representing muscular activity and physical inclination. It will do merely to recognize commonsensically, or empirically if you will, that the beliefs of those employed to express and inculcate educated beliefs (in the interest of cultural transmission) are important.

In *Brown v. Board of Public Education of Topeka*, 347 U. S. 483, 493, this Court expressed the role of education as "perhaps the most important" governmental function and the "principal instrument in awakening the child to cultural values . . . ."

Appellees are reluctant to accede, then, to the notion that the state is utterly powerless to condition employment of its children's teachers on an oath forswearing belief in "the overthrow of the Government of the United States or of the State of Florida by force or violence . . . ."

Appellant has cited an impressive array of decisions invalidating various "negative" oaths—decisions not without their attendant dissenting opinions, it must be noted. And it may be that this marked movement will be construed to have dispositively trampled underfoot the state's presumed authority to protect its posterity from the insinuation of revolutionists or votaries of violence into the school system. As Abraham Lincoln once advised: "When you have an elephant by the tail and he wants to run, it's sometimes wise to let him." But appellees are constrained to call such a movement precisely what it appears to be: a perilously perambulating pachyderm.

In this case, to universalize a prohibition upon a so-called "negative" oath and thereby to paralyze the state's protective efforts would indeed seem to threaten conversion of the Bill of Rights into a "suicide pact." *Terminello v. Chicago*, 337 U. S. 1, 37.

Appellant's attempted *reductio ad absurdum* of the oath provision forswearing belief in the overthrow of the governments "by force or violence" by reference to the words of Jerome Skolnick (*Appellant's Brief*, p. 20) is little short of amazing. Playing upon Mr. Skolnick's ruminations upon the instrumental value of violence, appellant asks: "Could Mr. Skolnick conscientiously make this oath?" To which these appellees must stand mute; for the answer to that question is no more coercive of this Court's decision than would be the case if appellant had instead addressed the words of Alice's

Mad Hatter and asked if the subject oath would offend him. No one knows.

We do know, however, that, in Brand Blanshard's words, a "massiveness of common sense" is required to do justice to all interests here affected: the state's, the children's, the teacher's.

Yet, appellant fancifully poses such questions as: "What does loyal mean?" "If he vocally disagrees with the Chamber of Commerce image of Florida as a citrus and vacation paradise, is he [the teacher] being disloyal . . . . ?" (Appellant's Brief, p. 39) "What is meant by a change? Does this mean that the oath-taker must believe that domestic violence has been unnecessary to achieve political goals . . .?" These and other imponderables, according to appellant, parade through the subject statutory oath.

> "To so interpret the language of the Act is to extract more sunbeams from cucumbers than did Gulliver's mad scientist. And to conjure up such ridiculous questions, the answers to which we all know or should know are in the negative, is to build up a whimsical and farcical straw man which is not only grim but Grimm." *Baggett v. Bullitt*, 377 U. S. 360, at 383 (Clark dissenting.)

IV.

SEVERABILITY

The lower court struck certain provisions of §876.05, Florida Statutes, and upheld the constitutionality of the two provisions hereinbefore discussed. In so doing the court cited the decision of this Court in *United States v. Jackson*, 390 U. S. 570, 585:

> "The unconstitutionality of a part of an Act does not necessarily defeat . . . the validity of its remaining provisions."

The tests are: Would the legislature have enacted the provisions within its power, independently of those invalidated?, *Ibid*, and Is the remainder "an operative whole"? *Id* at 591.

The lower court answered these questions in the affirmative as did the Supreme Court of Florida in *Cramp v. Board of Public Instruction*, 137 So.2d 828, treating of this very statutory oath.

It is unblinkably clear that no matter how consonant all of the oath's provisions were, one with the other, the product of the lower court's order is an operative whole the legislature's interest in which is not seriously to be doubted. The excision of certain provisions by the lower court rendered the statutory oath neither grammatically infirm nor beyond the respect or desire of a reasonable man or legislator. The remaining provisions of §876.05, Florida Statutes—swearing or affirming support; and forswearing belief in violent overthrow, of government—and of §876.07, Florida Statutes, are very much an intelligible whole to which appellant's attack has been, accordingly, directed. See Also, *Champlin Rfg. Co. v. Commission*, 286 U.S. 210, 86 ALR 403; *Harris v. Bryan* (Fla. 1956) 89 So.2d 601.

V.

HEARING

Appellant protests the absence of a statutory hearing procedure or other exculpatory means by which "the nonsigner might explain his actions and vindicate his loyalty." (*Appellant's Brief*, p. 44)

However consolatory such a mechanism might prove, it is to be doubted that its absence renders the subject statutes unconstitutional.

As stated by the court in *Hosack v. Smiley* (D. Colo. 1967) 276 F.Supp. 876, 880-881, a hearing is not always and under all circumstances an indispensible condition to constitutionality, *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U. S. 886, and with respect to a loyalty oath non-signer (1) there are no accusers or antagonists to confront, (2) there is no charge to disprove or to traverse and (3) a press conference would serve the purpose.

One must wonder if all statutes, or at least all statutes relating to qualifications (for office, for voting, etc.) are infirm absent a hearing at which an annointed expositor of the law's univocal meaning defines the statutory law from alpha to omega.

Appellees believe not.

VI.

CONCLUSION

The instant cause is apparently a test case, *Appellant's Jt. App.*, pp. 30 [121], 33 [127], 34 [140-Order of Ct.], 143 ["Facts," Judgment and Order, Oct. 30, 1969], brought by one knowledgeable of the oath but adverse to the oath concept.

The appellees submit: (1) The state has a compelling interest respecting the employment of teachers and the education of its children; (2) The "affirmative" provision of the subject oath is constitutionally immaculate; (3) The "negative" provision of the oath fairly and intelligibly reflects the state's legitimate interest; (4) The provisions of the statutory oath, including the two aforementioned, are severable without impairment of the oath *per se*.

Appellees subscribe to the notion that "the [judicial] decision" ought to be "made to fit as far as possible the expectations" of society, *Cohen, Reason and Law* (Free Press

1950) 79, for truly "expectation is the mother of obligation," *deJouvenel, Sovereignty* (Cambridge Univ. Press 1957) and justice.

Appellees respectfully request that the judgment of the lower court be affirmed.

Respectfully submitted,

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September 1970

CONNELL v. HIGGINBOTHAM ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

No. 79. Argued November 19, 1970—Decided June 7, 1971

Florida's statutory loyalty oath provision requiring a Florida public employee as an employment condition to swear that he will support the Federal and State Constitutions is constitutionally valid. The portion of the oath requiring him to swear that he does not believe in the violent overthrow of the Federal or State Government is invalid as providing for his dismissal without hearing or inquiry required by due process.

305 F. Supp. 445, affirmed in part, reversed in part.

Sanford Jay Rosen argued the cause for appellant. With him on the brief were *Tobias Simon* and *Melvin L. Wulf.*

Stephen Marc Slepin argued the cause for appellees. With him on the brief were *Rivers Buford, Jr.*, and *James W. Markel.*

PER CURIAM.

This is an appeal from an action commenced in the United States District Court for the Middle District of Florida challenging the constitutionality of §§ 876.05–876.10 of Fla. Stat. (1965), and the various loyalty oaths upon which appellant's employment as a school teacher was conditioned. The three-judge U. S. District Court declared three of the five clauses contained in the oaths to be unconstitutional,* and enjoined the State from con-

* The clauses declared unconstitutional by the court below required the employee to swear: (a) "that I am not a member of the Communist Party"; (b) "that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party"; and (c) "that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence."

ditioning employment on the taking of an oath including the language declared unconstitutional. The appeal is from that portion of the District Court decision which upheld the remaining two clauses in the oath: I do hereby solemnly swear or affirm (1) "that I will support the Constitution of the United States and of the State of Florida"; and (2) "that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence."

On January 16, 1969, appellant made application for a teaching position with the Orange County school system. She was interviewed by the principal of Callahan Elementary School, and on January 27, 1969, appellant was employed as a substitute classroom teacher in the fourth grade of that school. Appellant was dismissed from her teaching position on March 18, 1969, for refusing to sign the loyalty oath required of all Florida public employees. Fla. Stat. § 876.05.

The first section of the oath upheld by the District Court, requiring all applicants to pledge to support the Constitution of the United States and of the State of Florida, demands no more of Florida public employees than is required of all state and federal officers. U. S. Const., Art. VI, cl. 3. The validity of this section of the oath would appear settled. See *Knight* v. *Board of Regents*, 269 F. Supp. 339 (1967), aff'd *per curiam*, 390 U. S. 36 (1968); *Hosack* v. *Smiley*, 276 F. Supp. 876 (1967), aff'd *per curiam*, 390 U. S. 744 (1968); *Ohlson* v. *Phillips*, 304 F. Supp. 1152 (1969), aff'd *per curiam*, 397 U. S. 317 (1970).

The second portion of the oath, approved by the District Court, falls within the ambit of decisions of this Court proscribing summary dismissal from public employment without hearing or inquiry required by due process. *Slochower* v. *Board of Education*, 350 U. S. 551

(1956). Cf. *Nostrand* v. *Little,* 362 U. S. 474 (1960); *Speiser* v. *Randall,* 357 U. S. 513 (1958). That portion of the oath, therefore, cannot stand.

Affirmed in part, and reversed in part.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, concurring in the result.

I agree that Florida may require state employees to affirm that they "will support the Constitution of the United States and of the State of Florida." Such a forward-looking, promissory oath of constitutional support does not in my view offend the First Amendment's command that the grant or denial of governmental benefits cannot be made to turn on the political viewpoints or affiliations of a would-be beneficiary. I also agree that Florida may not base its employment decisions, as to state teachers or any other hiring category, on an applicant's willingness *vel non* to affirm "that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence."

However, in striking down the latter oath, the Court has left the clear implication that its objection runs, not against Florida's determination to exclude those who "believe in the overthrow," but only against the State's decision to regard unwillingness to take the oath as conclusive, irrebuttable proof of the proscribed belief. Due process may rightly be invoked to condemn Florida's mechanistic approach to the question of proof. But in my view it simply does not matter what kind of evidence a State can muster to show that a job applicant "believe[s] in the overthrow." For state action injurious to an individual cannot be justified on account of the nature of the individual's beliefs, whether he "believe[s] in the overthrow" or has any other sort of belief. "If

there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ." *Board of Education* v. *Barnette*, 319 U. S. 624, 642 (1943).

I would strike down Florida's "overthrow" oath plainly and simply on the ground that belief as such cannot be the predicate of governmental action.

MR. JUSTICE STEWART, concurring in part and dissenting in part.

The Court upholds as clearly constitutional the first clause of the oath as it comes to us from the three-judge District Court: "I will support the Constitution of the United States and of the State of Florida . . . ." With this ruling I fully agree.

As to the second contested clause of the oath, "I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence," I would remand to the District Court to give the parties an opportunity to get from the state courts an authoritative construction of the meaning of the clause. If the clause embraces the teacher's philosophical or political beliefs, I think it is constitutionally infirm. *Baird* v. *State Bar of Arizona*, 401 U. S. 1, 9–10 (concurring opinion); *Board of Education* v. *Barnette*, 319 U. S. 624, 642; *Cantwell* v. *Connecticut*, 310 U. S. 296, 303–304. If, on the other hand, the clause does no more than test whether the first clause of the oath can be taken "without mental reservation or purpose of evasion," I think it is constitutionally valid. *Law Students Civil Rights Research Council, Inc.* v. *Wadmond*, 401 U. S. 154, 163–164. The Florida courts should, therefore, be given an opportunity to construe the clause before the federal courts pass on its constitutionality.

See *Fornaris* v. *Ridge Tool Co.*, 400 U. S. 41, 43–44; *Reetz* v. *Bozanich*, 397 U. S. 82, 85–87; *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496, 498–501.

The Supreme Court of Florida has explicitly held that the various clauses of the oath are severable. *Cramp* v. *Board of Public Instruction*, 137 So. 2d 828, 830–831.